

THE HISTORICAL BACKGROUND OF THE POLICE POWER

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INTRODUCTION

Ever since Chief Justice John Marshall coined the term in *Brown v. Maryland*¹ in 1827, the police power has been a pivot of American constitutional thinking. As recently as 1991 the Supreme Court spoke in *Barnes v. Glen Theatre* of “[t]he traditional police power of the States” as one which “we have upheld [as] a basis for legislation”; this plurality opinion of the Court defined it as “the authority to provide for the public health, safety, and morals.”² True, in recent times the police power has been under pressure, and the jurisprudence associated with it manifests tensions of several kinds. First, tension results from the contemporary emphasis on constitutional rights, as these are normally seen as, to one degree or another, a trump which the police power cannot easily override. The expansion of the recognition of rights, the application of the Bill of Rights to the states, and the subsequent purported constraint of the police power will not, however, be discussed in any detail within this Article—although indisputably they involve questions of interest and importance. Second, a particular field of police power activity has been under fire in the last few decades, namely the promotion of public morals or public morality. It has even been argued by one current Supreme Court Justice that the Court’s decision in *Lawrence*

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¹ 25 U.S. (12 Wheat.) 419, 442–43 (1827); see *infra* notes 206, 214.

² 501 U.S. 560, 569 (1991).

*v. Texas*³ effectively means that the police power regarding public morality is being eliminated.⁴ Although the topic undoubtedly calls for attention, the implications of *Lawrence v. Texas* and of other cases in which provisions of morals legislation were struck down are outside the object of the present inquiry. Third, it is clear that modern constitutional scholarship, with its characteristic preference for rights, pays less attention to the police power than was the case in earlier times. A cursory glance at the tables of contents of the most authoritative constitutional law treatises and case books reveals the near absence of the entry "police power,"⁵ which stands in stark contrast to the extensive treatment of the topic by earlier constitutional scholars.⁶ Again, this Article will not consider the reasons for what seems to be a trend away from the study of the police power.

In summary, there are indeed question marks over the future of the police power, but I will not reflect upon the potential uncertainties that they raise, nor will I consider in a systematic way whether American constitutional law could be better conceptualized without the category of the police power. Rather, taking as its

³ 539 U.S. 558 (2003) (striking down a Texas statute making homosexual sodomy a crime, which had been applied to consenting adults acting in private, and overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

⁴ See *id.* at 590 (Scalia, J., dissenting) ("State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. *Every single one of these laws is called into question by today's decision . . .*") (emphasis added). Even assuming that Justice Scalia was right it would still be possible to maintain that some of the conduct he mentions could be regulated on grounds other than moral disapprobation. For example, Justice Souter has argued that the constitutionality of a statute banning public nudity should be analyzed in light of the detrimental secondary effects of that conduct. See *City of Erie v. Pap's*, 529 U.S. 277, 310 (2000) (Souter, J., concurring in part and dissenting in part); *Barnes*, 501 U.S. at 582 (Souter, J., concurring in the judgment); see also *City of Erie*, 529 U.S. at 282, 291 (accepting Justice Souter's secondary effects test in a plurality opinion). A similar point has been made by the editors of the *Harvard Law Review* with respect to other forms of conduct described by Justice Scalia, such as adultery and incest: "legitimate state interests other than moral disapprobation may justify regulating [them]." *The Supreme Court, 2002 Term—Leading Cases: Constitutional Law*, 117 HARV. L. REV. 226, 303 n.62 (2003). The possibility of separating morality from other considerations, which underlies this kind of argument, is not considered in this Article.

⁵ E.g., GILBERT GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (6th ed. 2000); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (3d ed. 1996); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (3d ed. 2000) [hereinafter 1 TRIBE]; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988). For occasional references to the police power, see GUNTHER & SULLIVAN, *supra*, at 162–63, 459; NOWAK & ROTUNDA, *supra*, at 310–12, 401–02; STONE ET AL., *supra*, at 1635–36, 1660; 1 TRIBE, *supra*, at 1046, 1342, 1348.

⁶ The two most complete works on the police power date from the early twentieth century. They are Ernst Freund's magisterial treatise, *THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS* (Arno Press 1976) (1904), and W. G. Hastings's thorough and lengthy essay, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROC. AM. PHIL. SOC'Y 359 (1900). Nothing of the sort has been written since then.

starting point the classical understanding of the police power as illustrated for instance in *Brown v. Maryland* and *Barnes v. Glen Theatre*, this Article will trace the historical background of this key notion of American constitutional law.⁷ Even if it were to be argued that because of the aforementioned tensions the police power is *no longer* a cornerstone of American constitutional law,⁸ this enterprise would still be worthwhile. On the one hand, the understanding of the historical origins of a legal institution is always of interest for its own sake insofar as it illuminates the past; on the other, it can reasonably be expected that that understanding will shed light on the status quo, whatever it may be.

The police power suffers from a surprising problem. Though it has been in constant use for many years and has proved important in the vocabulary of American constitutional law⁹ (indeed, it has been said to be “one of the most important concepts in American constitutional history”¹⁰), it is, or stands for, one of the most misunderstood ideas in constitutional law.¹¹ The meaning and implications of the term are far from clear; hence Thayer’s oft-quoted remark made as long ago as 1895: “[d]iscussions of what is called the ‘police power’ are often uninformative . . .”¹² It is my hope that, by inquiring into the historical origins of the police power, this Article will help to clarify the meaning of the phrase.

Where does the term “police power” come from? How and why was it incorporated into American constitutional law? What does it mean? These are the questions that I will address. It will become clear that in its broad, original meaning, which can be traced to the concept of internal police, the police power is a constitutive principle of American federalism. It will become clear too that American federalism cannot be fully understood without reference to the police power, for, as will be shown, “police power” was the name Americans

⁷ The concept of police power has been imported from American constitutional practice by countries which, like Argentina, drew inspiration from the American Constitution when drafting their own constitutions.

⁸ *Contra* David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 501 (2004) (“[The police power] is a concept at the center of profound developments in the American law.”).

⁹ FREUND, *supra* note 6, at iii.

¹⁰ Harry N. Scheiber, *State Police Power*, in 4 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1744, 1744 (Leonard W. Levy et al. eds., 1986).

¹¹ See 2 JOHN W. BURGESS, *POLITICAL SCIENCE AND COMPARATIVE CONSTITUTIONAL LAW* 136 (1893) (“[T]he police power . . . is the ‘dark continent’ of our jurisprudence. It is the convenient repository of everything for which our juristic classifications can find no other place.”); Walter Wheeler Cook, *What is the Police Power?*, 7 COLUM. L. REV. 322, 322 (1907) (stating that “[n]o phrase is more frequently used and at the same time less understood” than the police power).

¹² 1 JAMES BRADLEY THAYER, *CASES ON CONSTITUTIONAL LAW* 693 n.1 (1895).

chose in order to designate the whole range of legislative power not delegated to the federal government and thus retained by the states.¹³ That broad notion, it will be argued, is at the root of what seems today an unexplained head of power, namely the narrower concept of police power as the promotion of public health, safety, and morals.

My inquiry will conform to the following structure: Section I will deal with the formation of the idea of "police" in the writings of Vattel, Blackstone, and other eighteenth-century European thinkers. One of the most important findings of this research is that the early notions of police, or those associated with the term "police," are of particular relevance for the later development of the police power. Section II will analyze the meaning and scope of the concept of "police," one of the more slippery terms in the English language.¹⁴ Section III will consider the origin of the formative analogy between king and father and briefly sketch its philosophical underpinnings. The analogy, it will be argued, provided the context for the original theorizing about police (in the relevant sense of "police"). By means of a survey of the relevant portions of early American constitutional history, Section IV will show how the concept of "police" was adopted in the United States. Exploring the meaning that the word "police" had in eighteenth-century North America will help us to understand the use of the term in documents and court decisions of that time. Section V will explain the transformation of police into what we know as "the police power." Since it was mainly the courts that brought about this transformation, the pertinent early cases will be analyzed. Section VI will advance the idea, already hinted at, that there are broad and narrow definitions of police power remaining in American constitutional law, especially in the case law of the Supreme Court. Each definition will be studied here. For the purposes of the cases to be considered in Sections V and VI, a cut-off date will be established in the early twentieth century, with the rise of the so-called *Lochner* era, although I will make incidental references to some post-*Lochner* decisions.

I. THE HISTORY OF THE IDEA OF POLICE

The term "police" originally meant something other than law enforcement. It is instructive to look at its etymology first. "Police"—and its cognates "policy" and "polity"—come from the Latin *polītia*, which itself is a descendant of the Greek word *politeia* and, ultimately,

¹³ Compare with the legislative power of British colonies, which, it seems, does not have a name. See *infra* note 139.

¹⁴ "Police" is a slippery term in other languages, too. See *infra* notes 22, 94.

of *polis*.¹⁵ *Polūtia* meant civil administration or government, and, according to Peirce and Cook, "[t]he Romans conceived the word . . . as meaning the condition of the State."¹⁶ Ayto explains that in Medieval Latin a variant *polūtia* emerged, which became the French term "police" that was to be taken over by English.¹⁷

From the sixteenth century onwards "police" was used in English as a synonym of "policy," in the sense of commonwealth or organized state. It also signified civil organization and civilization.¹⁸ These meanings, however, became obsolete in the nineteenth century.¹⁹ By the early eighteenth century "police" started to denote what *polūtia* meant in Suarez's late Latin, namely the regulation, discipline, and control of a community; civil administration and public order.²⁰ This use had prevailed even earlier in the European continent, especially in France²¹ and Spain.²² It was also to be found in Scotland where

¹⁵ WALTER W. SKEAT, ETYMOLOGICAL DICTIONARY OF THE ENGLISH LANGUAGE 461–62 (new ed. rev. and enlarged 1935). The same is true of other romance languages, such as Spanish. See 4 JOAN COROMINAS & JOSÉ A. PASCUAL, DICCIONARIO CRÍTICO ETIMOLÓGICO CASTELLANO E HISPÁNICO 548 (1981).

¹⁶ J. LEONARD PEIRCE & HARRY CLAYTON COOK, MANUAL TO THE CONSTITUTION OF THE UNITED STATES ANNOTATED 52 (1938). In the seventeenth century the Spanish theologian Francisco Suarez used the term "*politia*" in his *De Legibus ac Deo Legislatore* as a synonym for the Latin terms *regimen* and *gubernatio*. The three words were used to connote human government and civil administration. See, e.g., 3 FRANCISCO SUAREZ, DE LEGIBUS AC DEO LEGISLATORE 145 (1975) ("Unde necesse est ut vel sentiat finem canonici iuris esse tantum externam *politiam* humanam, quod valde absurdum est, vel oportet ut sentiat finem iuris civilis non sistere in humana *politia* et externa pace ac iustitia reipublicae, sed etiam tendere ad veram felicitatem humanam.") (emphasis added) ("Therefore [Fortunio García de Ercilla] must hold that the end of canon law consists solely in external human government, which is quite absurd, or that the end of civil law is not just that order of human government, external peace and justice of the state, but also pursuing the true human felicity.").

¹⁷ JOHN AYTO, DICTIONARY OF WORD ORIGINS 402 (1990); see CHAMBERS DICTIONARY OF ETYMOLOGY 812–13 (Robert K. Barnhart ed., 1988) ("The English form *police* in the modern sense of law enforcement was borrowed from modern French *police*, but in its older sense of civil organization was borrowed from Old French *policie*").

¹⁸ These now obsolete senses of police were not differentiated from earlier use in the form *policie* in the fourteenth and fifteenth centuries. CHAMBERS DICTIONARY OF ETYMOLOGY, *supra* note 17, at 812–13.

¹⁹ 12 OXFORD ENGLISH DICTIONARY 22 (2d ed. 1989).

²⁰ *Id.*

²¹ *Id.*; see CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 44 (1993) (citing Claude Sayssel's early-sixteenth-century use of the term *la Police* to refer to one of the restraints on royal power in France); M. Raeff, *The Well Ordered Police State and the Development of Modernity in Seventeenth- and Eighteenth-Century Europe*, 80 AM. HIST. REV. 1221, 1235 (1975) (noting the emergence of the concept of police in eighteenth-century France heralded by Nicolas de LaMare's treatise TRAITÉ DE POLICE, first published in 1722).

²² In the fourteenth century the Spanish term "*policia*" meant politics. 4 COROMINAS & PASCUAL, *supra* note 15, at 548. The Spanish Dictionary of Authorities of 1737 records a different meaning: "the good order that ought to be preserved in the cities and republics through the observance of the laws and ordinances established for their good government." 5 REAL ACADEMIA ESPAÑOLA, DICCIONARIO DE AUTORIDADES 311 (photo. reprint 1976) (1737) (translated from Spanish). This sense of *policia* is similar to Vattel's "police." See *infra* text accompa-

"Commissioners of Police," for the general internal administration of the country, were appointed by Queen Anne in 1714. This was apparently the first official use of the word in Great Britain.²³

Scotland, in fact, had a lot to do with the development of the idea of police in the British Isles. Standard modern reference works on Scottish laws and institutions take it for granted that "police" always referred to municipal police forces,²⁴ but this is not the case. In eighteenth-century Scotland "police" had a very different meaning. The term appeared as a heading of miscellaneous regulations and in the context of a class of crimes, namely "offences against the police." In *Statute Law of Scotland*, published in 1757, Lord Kames included a category of laws called "police" which comprised a whole variety of regulations. The following are but a few examples:

That ladders, and other instruments to extinguish fire, be kept in every burgh That common women be put at the utmost ends of the town, where least danger of fire is; and that none set them houses in the heart of the town That none be found in taverns after nine at night²⁵

Most of the other regulations included by Lord Kames under the heading of police are of an economic type.²⁶ These economic rules, together with the non-economic ones mentioned above, instantiate an emerging pattern in the conceptualization of police that is recognizable in the elaborations of eighteenth-century writers like Vattel and Blackstone.²⁷

The category of "offences against the police" was apparently used for the first time in Scotland in John Erskine's *An Institute of the Law of Scotland*, published posthumously in 1773.²⁸ It was not present in

nying note 57. The aforementioned dictionary adds that *policia* also meant cleanliness. For more on this meaning, see *infra* text accompanying note 41.

²³ CHAMBERS DICTIONARY OF ETYMOLOGY, *supra* note 17, at 812-13; 12 OXFORD ENGLISH DICTIONARY, *supra* note 19, at 23; 3 LEON RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 1 (1948). For the idea of "police" in the Scottish Enlightenment, see W.G. Carson, *Policing the Periphery: The Development of Scottish Policing 1795-1900* (pt. 1), 17 AUSTRALIAN & N.Z. J. CRIMINOLOGY 207, 209-10 (1984).

²⁴ 11 ENCYCLOPAEDIA OF THE LAWS OF SCOTLAND 376 (1931); 16 THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPEDIA 233 (1995).

²⁵ LORD HENRY H. KAMES, STATUTE LAW OF SCOTLAND ABRIDGED: WITH HISTORICAL NOTES 271 (1757).

²⁶ See *id.* at 270, 274 ("To avoid dearth of corn, those who have not 1000 merks yearly of free rent prohibited to keep their horses at hard meat For the encouragement of the linen manufactures of this kingdom, enacted, That no corpse of any person whatever shall be buried in any shirt, sheet, or any thing else, except in plain linen, made and spun within this kingdom"). This economic dimension of police is also illustrated in the title of a book by PATRICK LINDSAY, THE INTEREST OF SCOTLAND CONSIDERED, WITH REGARD TO ITS POLICE, IN EMPLOYING OF THE POOR, ITS AGRICULTURE, ITS TRADE, ITS MANUFACTURES, AND FISHERIES (1733).

²⁷ See *infra* notes 99-100 and accompanying text.

²⁸ JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND ¶16, at 705 (Edinburgh, J. Bell 1773). Probably on the correct assumption that *An Institute of the Law of Scotland* was based on

either Erskine's previous work, *Principles of the Law of Scotland* (1754), or in George Mackenzie's *Institutions of the Law of Scotland* (1684). The latter is especially noteworthy as Erskine followed Mackenzie's order in his own *Institute*.

According to Erskine, crimes can be broadly divided into three categories. "Certain crimes are committed more immediately against God himself, others against the state, or the public peace, and a third sort against particular persons."²⁹ Offenses "against the laws enacted for the police or good government of a country" belong to the second class.³⁰ "Police" is here equated to "good government." As to these laws, Erskine explains:

The chief of those laws are calculated for the providing all the members of the community with a sufficient quantity of the necessities of life at reasonable rates, and for the preventing of dearth. . . . This crime was committed, either by landholders who refused to sell the produce of their land at a just price; or by merchants who bought up great quantities of corn, in the view of again selling it at a higher price, when the crop should be more scanty.³¹

In Scottish law this crime was known as "forestalling," and with that name it had previously appeared in Mackenzie's *Institutions*,³² but it was not there included in a category of offenses against the police as it would be in Erskine's *Institute*.

Immediately after explaining the crime of forestalling, Erskine expounds the laws "restraining idleness, and punishing sturdy beggars and vagabonds."³³ Although he does not expressly say so, it is safe to take these to also be instances of laws enacted for the police or good government of the country. As indicated below,³⁴ Blackstone likewise counted idleness and vagrancy as offenses against the public police.

Finally, Erskine affirms that "[t]here are many slighter offences against the penal laws, relating to the peace of the country, which . . . [are] rather trespasses than crimes."³⁵ Among these, he includes offenses against the laws preserving the game, another

earlier notes of Erskine's lectures, the *Oxford English Dictionary* indicates that the term "police" had been used by him not later than 1768, while Blackstone was finishing his *Commentaries*. 12 OXFORD ENGLISH DICTIONARY, *supra* note 19, at 22 (meaning 3.a).

²⁹ ERSKINE, *supra* note 28, ¶16, at 705.

³⁰ *Id.* ¶38, at 714.

³¹ *Id.*

³² SIR GEORGE MACKENZIE, THE INSTITUTIONS OF THE LAW OF SCOTLAND 223 (4th ed., Edinburgh, J. Watson 1706).

³³ ERSKINE, *supra* note 28, ¶39, at 714.

³⁴ See *infra* text accompanying note 89.

³⁵ ERSKINE, *supra* note 28, ¶39, at 715 (discussing crimes of a less severe nature).

typical example of what Blackstone will call offences against the public police.³⁶

Adam Smith also contributed to the Scottish development of the idea of police with a definition that was slightly different from the ones we have seen. In his *Lectures on Jurisprudence*, delivered at the University of Glasgow between 1762 and 1764,³⁷ Smith confirms the French origin of the term: "[t]he name [police] is French, and is originally derived from the Greek πολιτεία [*politeia*], which properly signified the policey of civil government"³⁸ Jurisprudence—"the theory of the general principles of law and government"³⁹—has four great objects or divisions, one of which is Police, the others being Justice, Revenue, and Arms.⁴⁰

According to Smith, police no longer carried the Greek meaning: "now it only means the regulation of the inferiour parts of government, viz. cleanliness, security, and cheapness or plenty."⁴¹ The latter "inferiour part" considers "the most proper way of procuring wealth and abundance"⁴² or, in other words, "the opulence of a state."⁴³ For when internal peace is secured—thanks to the respect for justice, the first end of every system of government⁴⁴—"the government will next be desirous of promoting the opulence of the state. This produces what we call police. Whatever regulations are made with respect to the trade, commerce, agriculture, manufactures of the country are considered as belonging to the police."⁴⁵ Smith attributed considerable importance to this economic meaning of police, intertwined in "the inferiour parts of government";⁴⁶ a meaning that we have already observed in contemporary Scottish jurisprudence.⁴⁷ It should be noted, however, that it has become

³⁶ See *infra* text accompanying note 89.

³⁷ The edited manuscript of the lectures was published for the first time in 1896 by Edwin Cannan. See ADAM SMITH, *LECTURES ON JURISPRUDENCE* 5 (R. L. Meek et al. eds., Clarendon Press 1978) (1896).

³⁸ *Id.* at 486.

³⁹ *Id.* at 398.

⁴⁰ *Id.*

⁴¹ *Id.* at 486.

⁴² *Id.* at 487.

⁴³ *Id.* at 398.

⁴⁴ *Id.*

⁴⁵ *Id.* at 5 (citation omitted).

⁴⁶ *Id.* at 486.

⁴⁷ KAMES, *supra* note 25, at 269–77; *supra* text accompanying note 26. These references to economic police regulations show that Crosskey is wrong when he contends that Adam Smith's use of the term "police" is not to be found in that of any other writer. See WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1303 (Univ. of Chi. Press 1953); see also *infra* note 95 (quoting Lieber's definition of "police," which includes reference to the role of maintaining "cleanliness").

obsolete.⁴⁸

Before analyzing Blackstone's contribution, let us focus on the work of a continental writer who wrote a few years before the *Commentaries on the Laws of England* was published. In 1758, the Swiss jurist Emmerich de Vattel published his *Le Droit des Gens*.⁴⁹ Although the author confessed in the Preface that his treatise was not an original work but a popularization of Christian Wolff's philosophical *Jus Gentium*,⁵⁰ Vattel's book "made a profound impression upon the mind of the time; and especially, upon the mind of America."⁵¹ This was made possible by an English translation of the book appearing the year after the original publication in French.⁵²

For Vattel the sovereign ought to watch over the nation "as a tender and wise father, and as a faithful administrator."⁵³ Insofar as he is a father, the sovereign ought to procure the true felicity of the

⁴⁸ See 12 OXFORD ENGLISH DICTIONARY, *supra* note 19, at 22 (meaning 3.b) ("In commercial legislation, Public regulation or control of a trade; an economic policy. *Obs.*"). The dictionary quotes Smith's "*Police of Grain*" for the earliest example of "police" being used in that sense. See 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF WEALTH OF NATIONS, Ch. XI, III (1776).

⁴⁹ See generally EMERICH DE VATTTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (1749-1750), reprinted in THE CLASSICS OF INTERNATIONAL LAW (J. Brown Scott ed., Oxford Univ. Press 1916).

⁵⁰ See C. G. Fenwick, *The Authority of Vattel* (pts. 1 & 2), 7 AM. POL. SCI. REV. 395 (1913), 8 AM. POL. SCI. REV. 375 (1914) (evaluating the strengths and weaknesses of LE DROIT DES GENS).

⁵¹ CROSSKEY, *supra* note 47, at 147. Crosskey adds, moreover, that: "In consequence of this, . . . [Vattel's book] was constantly cited by the politicians of our formative period; by the lawyers of the day; and by pamphleteers and newspaper essayists, of every shade of opinion and description." *Id.* Fenwick makes a similar point:

A century ago not even the name of Grotius himself was more potent in its influence upon questions relating to international law than that of Vattel. Vattel's treatise on the law of nations was quoted by judicial tribunals, in speeches before legislative assemblies, and in the decrees and correspondence of executive officials. It was the manual of the student, the reference work of the statesman, and the text from which the political philosopher drew inspiration. Publicists considered it sufficient to cite the authority of Vattel to justify and give conclusiveness and force to statements as to the proper conduct of a state in its international relations.

Fenwick, *supra* note 50, at 395. A significant example of the point made by Crosskey and Fenwick is the oral argument in the famous case *Gibbons v. Ogden*. See 22 U.S. (9 Wheat.) 1, 85 n.29 (1824) (citing to Vattel for authority on the potential for sovereign states to unite and still maintain their independence). There are further illustrations of Vattel's authority in American legal history. See Fenwick, *supra* note 50, at 407 (noting other American references to Vattel); see also J. M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 299-300 (1992) (illustrating how Vattel's work "developed enormous authority in the later eighteenth and nineteenth centuries . . .").

⁵² See generally EMERICH DE VATTTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS [THE LAW OF NATIONS] (London, Newbery et al. 1759-60) (Vol. II 1759) (Vol. I 1760).

⁵³ 1 *Id.* bk. I, ch. IV, § 42, at 21. In another passage, while dealing with private property and its limitations, he reiterates this idea of the sovereign as father: "as the father of his people, [he] may, and ought to set bounds to a prodigal, and to prevent his running to ruin . . ." 1 *Id.* bk. I, ch. XX, § 254, at 104.

nation, which is one of the principal objects of a good government. To name this object of government Vattel uses the French word *police*, which was translated as "polity" in the first English edition.⁵⁴ Some later English editions, however, chose the term "police" instead of "polity."⁵⁵ At any rate, these two words are cognates and were used interchangeably in the eighteenth century.⁵⁶ What does "polity" or "police" mean for Vattel?

Polity consists in the attention of the prince and magistrates to preserve everything in order. Wise regulations ought to prescribe whatever will best contribute to the *public safety, utility and convenience*, and those who have the authority in their hands, cannot be too attentive to their being observed. By a wise *polity*, the sovereign accustoms the people to *order and obedience*,⁵⁷ and preserves *peace, tranquility and concord* among the citizens

This may well be the début of the English term "polity" or "police" in a treatise of political theory.⁵⁸ Vattel elaborates on the term "police" by giving various examples of regulations. First, he gives the example of the prohibition on duelling,⁵⁹ which would become commonplace amongst police norms. Secondly, he mentions the rules that the sovereign, as a good father, ought to lay down to prevent the economic ruin of his "prodigal" sons.⁶⁰ These too are police regulations. Finally, Vattel adds further examples in the context of the limits of private property:

It must also be observed, that individuals are not free in the oeconomy or government of their affairs as not to be subject to the *regulations of polity*, made by the sovereign. For instance, if vines are greatly multiplied in a country, which is in want of corn, the sovereign may forbid the planting of the vine in fields proper for tillage, for here the public welfare and the safety of the state are concerned. When a reason of such importance requires it, the sovereign, or the magistrate, may oblige an individual to sell

⁵⁴ An anonymous translation of the 1793 edition also uses the term 'polity' for the French *police*. For a complete bibliography of the different editions of Vattel's book in different languages, see VATTEL, *THE CLASSICS OF INTERNATIONAL LAW*, *supra* note 49, at lvi–lix.

⁵⁵ See EMERICH DE VATTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* [THE LAW OF NATIONS] bk. I, ch. XIII, § 174, at 82 (Joseph Chitty trans., Sweet et al. eds., 1834) (using the term "internal police" instead of "polity"); *id.* bk. I, ch. XX, § 255, at 115 (referring to "regulations of police" instead of "regulations of polity").

⁵⁶ See CROSSKEY, *supra* note 47, at 149 (noting the parallel meaning of "polity" and "police").

⁵⁷ 1 VATTEL, *supra* note 52, bk. I, ch. XIII, § 174, at 76–77 (emphasis added).

⁵⁸ By way of contrast, Grotius had not touched upon the topic of police. See generally HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [Of the Law of War and Peace, in Three Books] (photo. reprint 1984) (Francis W. Kelsey trans., Clarendon Press 1925) (1625).

⁵⁹ 1 VATTEL, *supra* note 52, bk. I, ch. XIII, § 175, at 77 ("A duel . . . is a manifest disorder contrary to the welfare of Society.").

⁶⁰ *Id.* bk. I, ch. XX, § 254, at 104; see *supra* note 53 and accompanying text (analogizing the sovereign to a father figure).

all the provisions that are more than sufficient for the subsistence of his family, and fix the price. The public authority may and ought to hinder monopolies, and suppress all practices tending to raise the price of provisions⁶¹

We finally turn to England, where the French idea of police was regarded with disfavour. This was clearly witnessed, for example, by a letter signed by Tom Tipsey and published in the *British Magazine* in October 1763 with the title, "*Some droll Remarks on fashionable Words*":

The word *police* has made many bold attempts to get a footing. I have seen it more than once strongly recommended in the papers; but as neither the word nor thing itself are much understood in London, I fancy it will require a considerable time to bring it into fashion; perhaps, from an aversion to the French, from whom this Word is borrowed; and something, under the name of *police*, being already established in Scotland, English prejudice will not soon be reconciled to it.⁶²

Indeed, for some years the term "police" was only used by the English to make reference to the *police* of the French and other European nations.⁶³ It fell to Sir William Blackstone to establish the idea of "police" in English jurisprudence.

A contemporary of Vattel, Blackstone had read the work of European authors such as Samuel Pufendorf, whom he cites on several occasions.⁶⁴ Pufendorf had sown the seeds of the concept of

⁶¹ 1 VATTEL, *supra* note 52, bk. I, ch. XX, § 255, at 104 (emphasis added). Chitty's edition of 1834 reads: "It must also be observed, that individuals are not so perfectly free in the economy or government of their affairs, as not to be subject to the laws and *regulations of police* made by the sovereign." VATTEL, *supra* note 55, bk. I, ch. XX, § 255, at 115 (emphasis added).

⁶² THE BRITISH MAGAZINE OR MONTHLY REPOSITORY FOR GENTLEMEN & LADIES 542 (1763). Along similar lines, Radzinowicz affirms that "[w]hen the word 'police' was first introduced into England in the early part of the eighteenth century it was regarded with the utmost suspicion as a portent of the sinister force which held France in its grip." 3 RADZINOWICZ, *supra* note 23, at 1. This notable historian of English law then reproduces the following amusing and illuminating passage from a letter written from Scotland around 1720:

I am tempted (by way of Chat) to make Mention likewise of a *Frenchman*, who understood little *English*. Soon after his Arrival in *London*, he had observed a good deal of Dirt and Disorder in the Streets, and asking about the *Police*, but finding none that understood the Term, he cried out, "Good Lord! how can one expect Order among these People, who have not such a Word as *Police* in their Language.

Id.

⁶³ The *Oxford English Dictionary* illustrates well this point by quoting Swift, "Nothing is held more commendable in all great cities . . . than what the French call the *police*, by which word is meant the government thereof," (1732) and Keyser, "Their police is very commendable, and great attention is shewn in suppressing luxury, superfluous magnificence, and . . . dissipations" (1760). 12 OXFORD ENGLISH DICTIONARY, *supra* note 19, at 22 (meaning 3.a). Furthermore, Chesterfield is reported to have written in 1756 that "[w]e are accused by the French . . . of having no word in our language, which answers to their word *police*, which therefore we have been obliged to adopt, not having, as they say, the thing." *Id.*

⁶⁴ See, e.g., WILLIAM BLACKSTONE, 1 COMMENTARIES *43, *101; 4 *id.* at *7, *31.

police in his book, *The Law of Nature and Nations*.⁶⁵ Writing in 1672, he asked himself what the power of the prince was “[i]n Commonwealths . . . where the Properties of the Subjects do not originally depend upon the Government.”⁶⁶ His answer: “the civil Sovereign hath no further Power over them than what immediately flows from the Nature of the Supreme Power in itself, unless the Subjects freely consent to enlarge it.”⁶⁷ What is, then, the natural extent of this power? Without using the word “police,” Pufendorf nevertheless addresses the concept:

But now this Power we are here speaking of, may, I think, be reduc'd to three Heads: First, to the Right of making Laws to direct such a Proportion in the Use and Consumption of certain Goods and Commodities, as the State of the Commonwealth requires. Secondly, to the Right of levying Taxes. Thirdly, to the Exercise of the Transcendental Propriety. To the first Head we may reduce all *Sumptuary* Laws, or such as prescribe Bounds to extravagant unnecessary Expenses, which would, in Course of Time, be the Ruin of private Families, and, in Consequence, weaken the Commonwealth itself, by carrying the publick Money abroad into foreign Countries; whither the Humour or Vanity of Luxury and Waste generally runs. Besides, another Inconvenience to be prevented by such Laws is this, That they squander away their Fortunes extravagantly, make themselves incapable of serving the Publick To this Head, also, may be reduced Laws against Gaming, and Prodigality And further, under this Head we may rank all Laws that determine the Rates and Qualities of Possessions and Estates And we may further reduce under this Head all Laws which determine the Quantity and Measures of Grants and Legacies As, also, certain Laws that forbid certain Subjects to possess certain Kinds of Goods. . . . Moreover, Laws against idle and lazy People⁶⁸

⁶⁵ The book was published in 1672 and translated into English in 1749, shortly before Blackstone wrote his *Commentaries*. The complete name is *The Law of Nature and Nations: or, a General System of the most Important Principles of Morality, Jurisprudence, and Politics*.

⁶⁶ BARON S. PUFENDORF, *THE LAW OF NATURE AND NATIONS: OR, A GENERAL SYSTEM OF THE MOST IMPORTANT PRINCIPLES OF MORALITY, JURISPRUDENCE, AND POLITICS* 827 n.III (Basil Kennet trans., London, 5th ed. 1749) (1672).

⁶⁷ *Id.*

⁶⁸ *Id.* at 827–28 (footnotes omitted). The quotation omits, among others, Pufendorf's footnote to the term “Transcendental Propriety,” where he gives the alternative Latin form, “*Dominium Eminens*,” probably in order to clarify the former term's somewhat obscure meaning. It is worth considering that most commentators on the American Constitution deal with the power of “*eminent domain*” immediately before or after dealing with the police power. See, e.g., 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 415 *340; see *infra* text accompanying note 202. That contemporary scholarship does likewise is evident from the fact that the police power is often studied in connection with the constitutional regulation of “takings.” See, e.g., D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471 (2004); John J. Costonis, “Fair” Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975); D. B. Fawcett III, *Eminent Domain, the Police Power, and the Fifth Amendment: Defining the Domain of Takings Analysis*, 47 U. PITT. L. REV. 491 (1986); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Thomas, *supra* note 8, at 501;

Although Pufendorf does not use the word “police,” laws against gambling, idleness, and prodigality are typical examples of what would become police regulations.

Blackstone explicitly talks of “polity” and “police” in his *Commentaries on the Laws of England*, written between 1765 and 1769.⁶⁹ He addresses the topic twice, first in Book I while dealing with the prerogative of the king,⁷⁰ and later in Book IV when he refers to public wrongs. In both cases, he follows an approach similar to Vattel’s in that he also places police in the context of the analogy between king and father (and kingdom and family).

With regard to domestic concerns, the royal prerogative includes that which derives from the king’s position as arbiter of domestic commerce. In that capacity, he can establish:

[P]ublic marts, or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king’s grant, or by long and immemorial usage and prescription, which presupposes such a grant. The limitation of this public resorts, to such time and such place as may be most convenient for the neighbourhood, forms a part of *oeconomics*, or *domestic polity*; which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.⁷¹

Note that “oeconomics” and “domestic polity” are synonyms. We will subsequently observe that these terms are also synonymous with “oeconomy” and “police.”⁷²

Further examples of the prerogative of the king are the power to issue legal tender and “the regulation of weights and measures.”⁷³ The latter “for the advantage of the *public*, ought to be universally the

Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970).

⁶⁹ Hereinafter, I will follow the first edition of the *Commentaries*, published in 1765–1769, as the relevant sections were not significantly changed by the eighth edition of 1778, the last in Blackstone’s lifetime.

⁷⁰ Ernst Freund, probably the most influential author of the twentieth century in the field of the police power, stresses the relation between the royal prerogative and the police by calling the former “royal police power.” ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION: AN ESTIMATE OF RESTRICTIVE AND CONSTRUCTIVE FACTORS 38 (1917).

⁷¹ 1 BLACKSTONE, *supra* note 64, at *264 (emphasis added).

⁷² “It would seem that ‘oeconomy,’ ‘oeconomics,’ ‘police,’ and ‘polity,’ were all synonyms as Blackstone used them.” CROSSKEY, *supra* note 47, at 148.

⁷³ 1 BLACKSTONE, *supra* note 64, at *264. According to Peirce and Cook, the link between police and the regulation of weights and measures was of old lineage:

After the decline of the Empire and for a long chaotic period there was revived in the capitularies of Charlemagne a body of regulations for weights and measures, tolls and markets, the sale of food and cattle and the relief of famine and pestilence. From that time the orbit of control in a measure marked out by these particulars has, with intermittent consistency, been called “the police.”

PEIRCE & COOK, *supra* note 16, at 52.

same throughout the kingdom"⁷⁴ Once more, the idea of police appears connected with the public domain, and it seems clear too that police is synonymous with civil administration or, to use an expression that underscores the analogy I have already referred to, *domestic* administration.

We find the concept of police again discussed in Book IV of the *Commentaries*, where Blackstone deals with criminal law. Public wrongs, he affirms, are divided in two. On the one hand, there are "such crimes and misdemeanors as more especially affect the *common-wealth*, or public polity of the kingdom"⁷⁵ On the other hand, there are "those which are peculiarly pointed against the lives and security of private subjects,"⁷⁶ such as homicide or rape. The former offend the king "as the *pater-familias* of the nation; to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing . . . laws"⁷⁷ It seems the public dimension is more apparent in this type of offense. On the contrary, in crimes of the second group the public interest is involved more indirectly, inasmuch as a "private subject," the victim of a crime, is harmed. This private injury does not appear to be a characteristic of the wrongs in the first group, which *more especially* affect the commonwealth or public polity of the kingdom.

The crimes and misdemeanors "that more especially affect the common-wealth" may be subdivided, according to Blackstone, into five species: "offences against public *justice*, against the public *peace*, against public *trade*, against the public *health*, and against the public *police* or *oeconomy*"⁷⁸

⁷⁴ 1 BLACKSTONE, *supra* note 64, at *264 (emphasis added). In the following sentence he adds: "[b]ut, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard" *Id.*

⁷⁵ 4 *id.* at *127. One is tempted to call these "public crimes." Blackstone, however, is content with referring to them as crimes that "more especially affect the common-wealth," stopping short of giving them a generic name. The reason for not calling them "public" must be that crimes "which are peculiarly pointed against the lives and security of private subjects" are also public crimes. One could say, nonetheless, that the latter are *less public* than "such crimes and misdemeanors as more especially affect the *common-wealth*, or public polity of the kingdom." *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* Blackstone did not devise this from scratch. Two centuries earlier, King James I (James VI of Scotland) had stated the same idea:

By the Law of Nature the king becomes a naturall Father to all his Lieges at his Coronation: And as the Father of his fatherly duty is bound to care for the nourishing, education, and vertuous government of his children; euen so is the king bound to care for all his subjects.

KING JAMES I, THE TRUE LAWE OF FREE MONARCHIES: OR, THE RECIPROCK AND MUTUALL DUETIE BETWIXT A FREE KING AND HIS NATURALL SUBIECTES B4' (Edinburgh, R. Waldgrave 1598).

⁷⁸ 4 BLACKSTONE, *supra* note 64, at *128 (emphasis in original).

Offenses	Against the lives and security of private subjects e.g. homicide, rape, assault	
	Against the commonwealth or public polity of the kingdom	Against public justice
		Against the public peace
		Against public trade
		Against the public health
		Against the public police or oeconomy

It should be noted that “common-wealth” and “public polity” are treated by Blackstone as synonyms. We also know that “polity” meant the same as “police”;⁷⁹ hence it seems surprising that offenses against the public police (or economy) be one subdivision of offenses against the public polity (of the kingdom). This flexible use of the language suggests that Blackstone uses the terms “public polity” and “police” in two senses: a broader one synonymous with commonwealth, where they include public justice, peace, commerce, health, and police; and a narrower and more specific meaning, which comprises only part of what concerns the common-wealth. What does this part consist of? Let Blackstone tell us:

By the *public police* and *oeconomy* I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, *like members of a well-governed family*, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.⁸⁰

This is the third instance in which the *Commentaries* explains *police* by making an analogy to the domestic and the familial.⁸¹ Moreover, the public dimension of police stands out yet again because these are “all such crimes *as especially affect public society*, and are not comprehended under any of the four preceding species.”⁸² They are, in other words, “offences *against the public order* and oeconomical regimen of the state”⁸³ Hence, “[t]his head of offences must

⁷⁹ Blackstone used “polity” synonymously with “oeconomics,” see *supra* text accompanying note 71, and “police” synonymously with “oeconomy,” see *supra* text accompanying note 78. Hence, “polity” and “police” were synonyms, too. This conclusion based on a textual analysis is further supported by the accepted use of the terms “polity” and “police” in the eighteenth century. See *supra* notes 55–56, 72 and *infra* Section IV.

⁸⁰ 4 BLACKSTONE, *supra* note 64, at *162 (emphasis added).

⁸¹ For the other two instances, see *supra* text accompanying notes 71, 77.

⁸² 4 BLACKSTONE, *supra* note 64, at *162 (emphasis added).

⁸³ *Id.* at *167 (emphasis added).

[be] miscellaneous"⁸⁴ and residuary, without clear contours. The reference to "public order" throws some light but it ought to be recalled that in common law systems that term means less than in civil law. Whereas in the latter, public order goes hand in hand with public morals and *bonos mores*,⁸⁵ in common law "it signifies absence of disorder (i.e. public peace, tranquility, and safety)."⁸⁶ Nevertheless, the analysis of Blackstone's texts shows that good manners are in fact not foreign to the public order that the king promotes through police.⁸⁷

Blackstone attempts an inventory of crimes against the public police in Chapter XIII of Book IV of the *Commentaries*—the same chapter in which he deals with crimes against public health. That these two share a chapter is significant, since the other three of the five species of offenses against the commonwealth are dealt with in separate chapters (Chapter X for offenses against public justice, Chapter XI for offenses against public peace, and Chapter XII for offenses against public trade). Over time, public health would become one of the goods typically to be promoted by the police power.⁸⁸

The list of offenses against public police reads as follows:⁸⁹

- Clandestine marriages and bigamy
- Idleness and vagrancy (which includes the laws dealing with "idle soldiers and mariners," and with "Egyptians or gypsies")
- Luxury
- Gaming
- Offenses regulated by game laws, that is, regulations concerning the hunting of certain types of animals
- Common nuisance

⁸⁴ *Id.* at *162.

⁸⁵ See, e.g., Article 19 of the Argentine Constitution of 1853: "The private actions of men which in no way offend order and public morality, nor harm a third party, are reserved to the judgment of God only, and exempt from the authority of the magistrates . . ." CONST. ARG. art. 19. Another illustration can be found in Article 21 of the Argentine Civil Code: "Private contracts cannot void laws in whose observance public order and good morals are involved." Cód. Civ. art. 21. Similarly, the Chilean Constitution recognizes several fundamental rights subject to limitations imposed for the protection of morals, good customs, public order and national security. See, e.g., CONST. CHILE art. 19 §§ 6, 11, 16, 21.

⁸⁶ J. M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 215 (1980). Finnis stresses the difference between the French and Spanish expressions *ordre public* and *orden publico*, and the common law concept of public order. The former are "almost as wide as the concept of public policy in common law." *Id.*

⁸⁷ See *supra* text accompanying note 80.

⁸⁸ Blackstone's examples of offenses against public health, such as the selling of unwholesome provisions, are similar to instances of the power of regulation given by James Kent, one of the first constitutional scholars of the United States. See 2 KENT, *supra* note 68, at *340; *infra* text accompanying note 202.

⁸⁹ 4 BLACKSTONE, *supra* note 64, at *163–75.

This last type of offense against public police deserves separate comment.⁹⁰ Blackstone defines common nuisance as “the doing of a thing to the annoyance of all the king’s subjects, or the neglecting to do a thing which the common good requires.”⁹¹ Unlike private nuisances, the former “annoy the whole community in general, and not merely some particular person”⁹² Common nuisances constitute a sub-type of offenses against public police. The following are examples advanced by Blackstone:⁹³

- Annoyances in highways, bridges, and public rivers
- Offensive trades and manufactures (when detrimental to the public and not just to a private person)
- Disorderly inns and ale houses
- Lotteries
- Making and selling of fireworks

II. THE MEANING AND SCOPE OF THE IDEA OF POLICE

It is now time to reflect on the extent of the notion of police as we find it employed by seventeenth- and eighteenth-century authors such as Pufendorf, Vattel, Smith, and Blackstone. First, as has become obvious, in those centuries “police” had a very different meaning from nowadays. It was only much later that the word started to connote mainly that body of persons—*policemen*—specialized in keeping order and investigating crimes.⁹⁴ Until the nineteenth century “police” had a wider meaning, which denoted the regulation, discipline, and control of a community, its civil administration and the maintenance of public order.⁹⁵ This meaning survives today in

⁹⁰ William J. Novak highlights the importance of the law of nuisance in the configuration of what he calls “the well-regulated society,” namely nineteenth-century America, a society in which, in Novak’s view, ideas such as Blackstone’s crystallized in legislative practice. WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

⁹¹ 4 BLACKSTONE, *supra* note 64, at *167 (footnote omitted).

⁹² *Id.* at *167–68.

⁹³ *Id.* The examples set out in the main text are still common nuisances, now often known as “public nuisances,” in English common law. WINFIELD & JOLOWICZ ON TORT 505 (W. V. H. Rogers ed., 16th ed. 2002).

⁹⁴ The same happened in other romance languages such as Spanish in which *policía* only started to mean the body of officials specialized in keeping order as late as the beginning of the nineteenth century. See COROMINAS & PASCUAL, *supra* note 15. As for English, Ayto states that “the first body of public-order officers to be named *police* in England was the Marine Police, a force set up around 1798 to protect merchandise in the Port of London.” AYTO, *supra* note 17, at 402. In Scotland, however, the first recorded use of “police” in specific reference to those concerned with enforcing the law and maintaining public order is found around 1730. CHAMBERS DICTIONARY OF ETYMOLOGY, *supra* note 17.

⁹⁵ Writing in 1832, Francis Lieber stated in the *Encyclopaedia Americana* that police “in the common acceptance of the word, in the U. States and England, is applied to the municipal

the vocabulary of American constitutional law—especially in the context of the “police power”—but is absent in colloquial English. Hence, the rhetoric of police as it appears in seventeenth- and eighteenth-century discussions can sound strange to our ears.

From the point of view of criminal law, police was a protected good of far-reaching scope during the period we have analyzed, requiring the proscription and regulation of types of conduct that are so different that it is not easy to discover any common denominator. Their grouping seems to be defined negatively, comprising in the criminal field that which both is not included within the crimes against the lives and security of private subjects, and also is not an offense against public justice, peace, commerce or health. Apart from criminal law, police is an object or end of government which embraces certain subject matters that do not fit properly under the other main objects of government of which the prince or king has to take care, namely justice, international relations, taxation, and eminent domain.⁹⁶ Both in the criminal and non-criminal fields police refers to relations involving a public element. The impact of an activity on a particular individual, even when it exists, is peripheral to the idea of police. In offenses against police there is an effect on the public such that even when it could otherwise be expressed in terms of offense to an individual—for example, the neighbor that suffers the nuisance caused by a disorderly inn—the reality is better conveyed with the language of the common goods protected by police (public morals, public order, public safety). When it prohibits or regulates the activities of a disorderly inn, the state government is for the most part not looking after *that* individual neighbor, who perhaps made the complaint, but rather after the peace of the whole neighborhood and of the entire city.⁹⁷

rules, institutions and officers provided for maintaining order, cleanliness, &c. . . .” By way of contrast, “in all the great countries of the European continent, there is, besides this police, a military police extending over the whole state . . .” *ENCYCLOPAEDIA AMERICANA* 214 (F. Lieber, ed., Phila., Carey & Lea 1832).

⁹⁶ The same would later happen *mutatis mutandis* with the police power. See *infra* note 279.

⁹⁷ Elaborating upon the modern idea of public order, Finnis makes a similar point:

Inciting hatred amongst sections of the community is not merely an injury to the rights of those hated; it threatens everyone in the community with a future of violence and of other violations of right, and this threat is itself an injury to the common good and is reasonably referred to as a violation of public order. Rioting and bombing, and threats thereof, are not merely prejudicial to the rights of those killed or injured, but to everyone who has now to live in a community where such things happen. The operation of a grossly noisy aeroplane can be said to violate the rights of those awakened and deafened by it, but the problem is quite reasonably described as one of public order or public nuisance and not pinned down to the rights of those who happen so far to have been affected.

FINNIS, *supra* note 86, at 217–18.

A more careful look at the texts might take us a bit further. Because the king is like a *paterfamilias* he is not only concerned with preventing his subjects from killing each other or with making war against the enemy. Because the king is not a mere guarantor of justice, as the sophist Lycophron had suggested,⁹⁸ but rather a tender and wise father (in words which belong to Vattel),⁹⁹ he ought to take care of the community more broadly. This additional responsibility, which corresponds to the quasi-paternal nature of public authority—as conceived by these seventeenth- and eighteenth-century authors—is police, the well-ordered pursuit of the common good (at least in those respects not already categorized, such as defense, administration of justice, etc.). It comprises both regulations of an economic type¹⁰⁰ (for instance, rules of fairness in trade such as the establishment of public weights and measures and limitations of property for the sake of public interest) and other ones dealing with non-economic matters such as morals and good manners (for example, prohibition on duelling and vagrancy, and regulation of disorderly inns and gambling).¹⁰¹ The inclusion of the latter non-economic rules indicates that the preservation of public morals was included within the eighteenth-century understanding of police.¹⁰² Notwithstanding that public morals had not been clearly articulated as a differentiated concept at that time, this conclusion seems reasonable since the content of non-economic police regulations coincides with that of the so-called “morals laws” that the states would introduce and uphold in exercise of their police power in eighteenth-century America.¹⁰³

⁹⁸ See 3 ARISTOTLE, POLITICS 1280b10–11 (T. J. Saunders ed., T. A. Sinclair trans., Penguin Books 1981).

⁹⁹ 1 VATTEL, *supra* note 52, bk. I, ch. IV, § 42, at 21.

¹⁰⁰ See 1 BLACKSTONE, *supra* note 64, at *264 (contradicting Crosskey's claim despite categorizing offenses against trade separately from offenses against the public police); see also *supra* notes 71, 73 and accompanying text (quoting Blackstone's COMMENTARIES). *Contra* CROSSKEY, *supra* note 47, at ch. VI (denying that in the eighteenth century police regulations included matters pertaining to commerce).

¹⁰¹ The line that divides economic from non-economic regulations of police is far from clear. For instance, sumptuary laws and laws against prodigality protect people from their own excesses and this has an apparent moral connotation. While doing so, however, they produce an equally apparent economic impact. The same could be argued with regard to the regulation of intoxicating liquors, drugs, and cigarettes, which affects the functioning of major industries. Moreover, a similar argument could be advanced with respect to the regulation of prostitution and obscenity, and with reference to vagrancy laws. Notwithstanding its limitations, the distinction between economic and non-economic police rules retains a certain rationale and it has been accepted by such an authority as Ernst Freund, who distinguishes between “primary social interests” (security, order, and morality) and “economic interests” when explaining the fields in which the police power operates in American law. FREUND, *supra* note 6, at x–xxi.

¹⁰² CROSSKEY, *supra* note 47, at 150 (exploring police as an object of government).

¹⁰³ Even before the existence of the states, the American colonies exercised police powers in moral questions. *Id.* at 152.

The ascription of paternal responsibilities to the sovereign entailed more than just his authority to legislate in matters affecting public morality and other matters included in public police. The characterization of the king as father also grounded another common law doctrine, *parens patriae*,¹⁰⁴ according to which the prerogative of the king extended to the care of certain classes of people who lacked parental care, such as neglected children and incompetents.¹⁰⁵ As with that of police, this doctrine was well-received by the legal institutions of the United States, where each state fulfilled the role of *parens patriae*.¹⁰⁶ The doctrine of *parens patriae* is present in some form and under some name in every reasonable legal system for no reasonable state would wish to violate the basic ethical imperative of looking after children deserted by their parents—the most extreme case falling under *parens patriae*.

Let us turn back to the analogy between king and father which is at the root both of the idea of public police and of the doctrine of *parens patriae*. How far does this analogy reach? Is there any difference between the end and scope of paternal authority and those of political authority? These questions relate closely to a further query: does the authority of the sovereign for the promotion of police have any limits?¹⁰⁷ The authors analyzed in the preceding section do not face these questions squarely, but the very idea of analogy connotes not only similarity but also some difference.¹⁰⁸ The

¹⁰⁴ As early as 1598, King James I (James VI of Scotland) stated that “the stile of *Pater Patriae* was ever, & is commonly used to kings.” JAMES I, *supra* note 77, at D3.

¹⁰⁵ Under *parens patriae*, charities too were under a special control and care of the government of the state. See William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1093–94 (1994) (noting the sovereign’s power to regulate charities and similar entities).

¹⁰⁶ In the United States the term “*parens patriae*” has also been used to name the capacity in which a state may act for the purpose of protecting the well-being of its entire populace and its economy, in the context of the original jurisdiction of the Supreme Court to decide controversies between states or between a state and a citizen of another state. For example, it has been said judicially that a state as *parens patriae* has in some cases the right to invoke the original jurisdiction of the Court. See G. B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895, 907–15 (1976) (exploring the innovation of American courts in this realm).

¹⁰⁷ It should be noted that these seventeenth- and eighteenth-century writers still did not articulate the questions posed in the text in terms of rights that limit state interference. For an exception, see *infra* notes 115–16.

¹⁰⁸ In the context of patriarchalism, Schochet distinguishes theories that identify king with father and those that only draw an analogy between the two notions.

An identification requires a *total* transference of meaning from one entity to the institution for which it is being used as a symbol. A comparison or simile, on the other hand, leaves open the questions of the ways in which the two entities or institutions are alike and different. It allows, and even invites, debate about how well and how much a particular symbolic explanation fits.

king is not a father, but *like* a father. In fact, several texts support the idea that these writers have in mind an analogy that is limited.

Thus, for Vattel, the end or object of civil society is to procure whatever contributes to the happiness both of itself and of its individual members: "If a nation is obliged to preserve itself, it is not less obliged carefully to preserve all its members. The nation owes this to itself; since the loss of even one of its members weakens it, and is injurious to its own preservation."¹⁰⁹ Nevertheless, it seems that the authority of the government for the promotion of happiness is not unrestricted; rather, its rationale is to secure "the peaceful possession of property, a method of obtaining justice with security; and, in short, a mutual defence against all violence from without."¹¹⁰ Furthermore, through the act of political association "each citizen subjects himself to the authority of the entire body, *in every thing that relates to the common welfare*."¹¹¹ It seems reasonable to infer that what does not relate to the common welfare remains outside the scope of the authority of the sovereign. This limitation, however, does not affect the core of the analogy between king and father, the force of which can be observed in other texts that reaffirm the wide extent of the sovereign's authority. Hence:

It is not enough to instruct the nation; it is still more necessary, in order to conduct it to happiness, to inspire the love of virtue, and the abhorrence of vice . . . Let him [the prince] employ all his authority in order to encourage virtue, and suppress vice; let him for this purpose form public establishments; and to the same end direct his own conduct, his example, and the distribution of favours, posts, and dignities. Let him carry his attention *even to the private life of the citizens*, and banish from the state whatever is proper only to corrupt the manners of the people.¹¹²

Nonetheless, Vattel observes that "vice may be suppressed by chastisements, but . . . mild and gentle methods can only raise men to the dignity of virtue: it may be inspired, but it cannot be

GORDON J. SCHOCHET, PATRIARCHALISM IN POLITICAL THOUGHT: THE AUTHORITARIAN FAMILY AND POLITICAL SPECULATION AND ATTITUDES ESPECIALLY IN SEVENTEENTH-CENTURY ENGLAND 146 (1975).

¹⁰⁹ 1 VATTEL, *supra* note 52, bk. I, ch. II, § 17, at 13.

¹¹⁰ *Id.* bk. I, ch. II, § 17, at 12 n.15.

¹¹¹ *Id.* bk. I, ch. II, § 17, at 9 n.2 (emphasis added). Note the parallel between the quoted passage and the following text of Aquinas: "Man is not ordained to the body politic in respect to all that he is and has . . ." ["*homo non ordinatur ad communitatem politicam secundum se totum, et secundum omnia sua*"]. 2 THOMAS AQUINAS, SUMMA THEOLOGICA I-II, q. 21, art. 4, ad 3 (Fathers of the English Dominican Province trans., Burns Oates & Washbourne Ltd., 3d ed. 1942) (c. 1267-73); *see also* 1 VATTEL, *supra* note 52, bk. I, ch. III, § 26, at 15 (explaining that public authority prescribes to each individual the conduct he ought to observe "with a view to the public welfare").

¹¹² 1 VATTEL, *supra* note 52, bk. I, ch. XI, § 115, at 50 (emphasis added).

commanded."¹¹³ It is for "politics" to teach the prince in detail the different means of attaining these desirable ends. In other words, his power is not subject to a principled limitation but rather to prudential considerations "on account of the dangers that might attend the execution, and the abuses that might be made of them."¹¹⁴

There is one exception where Vattel presents a more articulated doctrine. Religion, he argues, "[a]s it is seated in the heart it is an affair of conscience, in which every one ought to be directed by his own understanding: but as it is external, and publicly established, it is an affair of the state."¹¹⁵ Moreover:

A citizen has only the right of never being obliged to do any thing in religious affairs, and not that of doing outwardly whatever he pleases, though it may proceed from his regard to society. The establishment of religion by the laws, and its public exercise, are matters of state, and are necessarily under the jurisdiction of the public authority.¹¹⁶

Blackstone for his part also implicitly rejects a complete equation of paternal and regal authority. In a crucial passage of the *Commentaries* dealing with "human laws" he states:

For the end and intent of such laws being only to regulate the behaviour of mankind, as they are members of the society, and stand in various relations to each other, they have consequently no business or concern with any but social or relative duties. Let a man therefore be ever so abandoned in his principles or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself, (as drunkenness, or the like) then they become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case.¹¹⁷

¹¹³ *Id.* Chitty's edition of Vattel's work expresses the idea more clearly: "[M]ild and gentle methods alone can elevate men to the dignity of virtue . . ." VATTEL, *supra* note 55, bk. I, ch. XI, § 115, at 51.

¹¹⁴ 1 VATTEL, *supra* note 52, bk. I, ch. XI, § 115, at 50; *cf.* 1 BLACKSTONE, *supra* note 64, at *165-66 (insisting on numerous occasions that those in authority have to be moderate in the application of punishment and that it is praiseworthy that some sanguinary laws are applied with mitigation, if at all).

¹¹⁵ 1 VATTEL, *supra* note 52, bk. I, ch. XII, § 127, at 54.

¹¹⁶ *Id.* bk. I, ch. XII, § 129, at 55.

¹¹⁷ 1 BLACKSTONE, *supra* note 64, at *119-20. When dealing with criminal law in Book IV of the *Commentaries*, Blackstone reiterates this idea in another critical passage:

[H]uman laws can have no concern with any but social and relative duties; being intended only to regulate the conduct of man, considered under various relations, as a member of civil society. All crimes ought therefore to be estimated merely according to the mischiefs which they produce in civil society: and, of consequence, private vices, or the breach of mere absolute duties, which man is bound to perform considered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by

This text has an extraordinary parallel with Aquinas's treatment of the purpose of human law, which perhaps has passed too little noticed. Writing in the Middle Ages, Aquinas had argued that "[t]he purpose of human law and the purpose of divine law are different".¹¹⁸

For human law's purpose is the temporal tranquility of the state, a purpose which the law attains by coercively prohibiting *external* acts to the extent that those are evils which can disturb the state's peaceful condition (emphasis added).¹¹⁹

Moreover, he states that:

The form of community to which human law is directed is different from the community to which divine law is directed. For human law is directed to civil community, which is a matter of people *relating to one another*. But people are related to one another by the *external* acts in which they communicate and deal with each other. But this sort of communicating is a matter of justice, which is properly directive in and of human community. So human law does not put forward precepts about anything other than acts of justice [. . .]¹²⁰

Finally, when considering whether human law may legitimately prohibit all vices, Aquinas argues that:

[H]uman law is framed for a number of human beings, the majority of whom are not perfect in virtue. Wherefore human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those *that are to the hurt of others*, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike.¹²¹

The similarities between these texts and Blackstone's are sufficiently apparent and need no further elaboration.

their evil example, or other pernicious effects, they may prejudice the community, and thereby become a species of public crimes. Thus the vice of drunkenness . . .

4 *Id.* at *41.

¹¹⁸ AQUINAS, *supra* note 111, at I-II, q. 98, art. 1c. Finnis has shown that this central thesis was also set out by Aquinas in a very elaborate and clear way in a series of draft chapters of the SUMMA CONTRA GENTILES which he eventually decided to excise. J. M. FINNIS, AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY 223-24, 252-53 (1998).

¹¹⁹ AQUINAS, *supra* note 111, at I-II, q. 98, art. 1c.

¹²⁰ *Id.* at I-II, q. 100, art. 2c (emphasis added).

¹²¹ *Id.* at I-II, q. 96, art. 2c (emphasis added). After analyzing this text, with its reference to *harm* ("the hurt of others"), and the many other texts which indicate that human laws should not interfere with vices that lack a relevant relationship with other persons, Finnis concludes that Aquinas's position is not readily distinguishable from John Stuart Mill's harm principle. See FINNIS, *supra* note 86, at 222-28. R. P. George is of a different view, although he strives to downplay his divergence from Finnis. See R. P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 28-31 (2000) (analyzing Finnis's position on state enforced morality). Finnis's thesis about the relationship between Aquinas and Mill could also apply to the relationship between Aquinas and Blackstone.

III. THE ORIGIN AND PHILOSOPHICAL UNDERPINNINGS OF THE ANALOGY BETWEEN KING AND FATHER

We can conclude from the preceding section that the idea of police was, at least to some extent, born of the analogy between king and father. If this is correct, then the doctrine of police is better understood if one keeps that analogy in mind. The analogy, however, was not a creation of Vattel, Blackstone or the other framers of the concept of police. It was first affirmed by Plato who stated that the polis and the family only differed *in multitudine et paucitate*, that is, in their size.¹²² Aristotle criticized him and held the view that polis and family, and so also political and familial government, are essentially different, but his reasons are not relevant for the purpose of this Article.¹²³ Aristotle's conception prevailed throughout the Middle Ages,¹²⁴ and it was only in early modernity that the analogy between king and father gained currency as an explanation of political obligation.¹²⁵ Although it had important and quasi-official antecedents and sponsorship in the late-sixteenth and early-seventeenth century,¹²⁶ the patriarchal theory emerged in England through the writings of Sir Robert Filmer, whose book *Patriarcha: or the natural Power of kings* was published posthumously in 1680.¹²⁷ The analogy—or rather, in the case of Filmer, the equation¹²⁸—of king and father, which is the key idea of the book, is asserted in its very title, *Patriarcha*, which foreshadows Blackstone's reference to the king

¹²² PLATO, STATESMAN *259bc.

¹²³ See 1 ARISTOTLE, *supra* note 98, at 1252a8–19, 1253b19–24; see also *id.* at 1255b18–19.

¹²⁴ See SCHOCHET, *supra* note 108, at 29 (“The moral patriarchal theory was probably totally absent from medieval political thought, for no thinkers seem to have utilized the image of paternal authority as a direct justification of political obligation.”).

¹²⁵ *Id.* at 19 (“It was not until the seventeenth century that familial reasoning was used as a direct justification for political obligation.”). Bossuet argues to the contrary that the idea of the king as father is much older and can be traced to the Old Testament. JACQUE-BENIGNE BOSSUET, POLITICS DRAWN FROM THE VERY WORDS OF HOLY SCRIPTURE 44 (Patrick Riley ed. & trans., Cambridge Univ. Press 1990) (1709) (“[T]he ancient peoples of Palestine called their kings Abimelech, that is to say: my father the king. Subjects took themselves to be children of the prince: and, each one calling him, My father the king, this name came to be shared by all the kings of the country.”).

¹²⁶ SCHOCHET, *supra* note 108, at Chapter V; see also *supra* note 77 and accompanying text.

¹²⁷ Filmer wrote the book around 1640. The same idea is present in the works of Jacques-Bénigne Bossuet, the great French bishop who, like Filmer, advanced a theory in favor of the divine right of kings. In his *Politique tirée des propres paroles de l'Écriture sainte* [*Politics Drawn from the Very Words of Holy Scripture*], written between 1679 and 1703, and published posthumously in 1709, Bossuet insisted that the king was to govern his subjects as a good father. Article III of the Third Book of the *Politique* is entitled: “Royal authority is paternal, and its proper character is goodness.” See also BOSSUET, *supra* note 125, at bk. 2, art. III.

¹²⁸ In Filmer the metaphor gave way to a strict identification (between king and father). See SCHOCHET, *supra* note 108, at 148; see also *supra* note 108 and accompanying text.

as *paterfamilias*.¹²⁹ In the following passage, Filmer elaborates upon the equation of the role of the father in a family with that of the king in a state:

If we compare the Natural Rights of a Father with those of a King, we find them all one, without any difference at all, but only in the Latitude or Extent of them: as the Father over one Family, so the King as Father over many Families extends his care to preserve, feed, cloath, instruct, and defend the whole Commonwealth . . . ; so that all the Duties of a King are summed up in an Universal Fatherly Care of his people.¹³⁰

Filmer's idea was part of a lengthier argument in favor of the absolute and divine right of the king. According to his theory, the king's fatherly authority was first vested in Adam and by right belongs to all princes ever since. The theory as such collapsed under the devastating critique of John Locke,¹³¹ but the analogy of the king as father remained an appealing framework for jurists to elaborate theories of kingly or state power.¹³² The doctrines of public police and *parens patriae* are important elements of some of those theories. I will now briefly argue that both doctrines are better understood in light of an even older tradition of political thought—the classical or central tradition according to which politics is not conceived on the model of the family and father, but is part of a wider concern for ethics, that is, for good and right choices and actions.

On this view, the police for the promotion of public morals requires an ethical evaluation of the kinds of conduct to be fostered, regulated or forbidden. For example, in the context of *parens patriae*, a judge could not decide what is best for “the child's moral welfare and the good of society,”¹³³ in order to decide whether to withdraw the custody from his or her parents, without making a moral judgment. Thus, even if judges were to endorse a theory of state neutrality, they could not take their practical decisions without having regard to ethical considerations: it is not possible to decide what is for “the moral welfare” of a person without judging what is good for him or her. The inappropriateness—as it seems on the classical view—of aspiring to any thoroughgoing state neutrality

¹²⁹ 1 BLACKSTONE, *supra* note 64, at *127; see *supra* note 77 and accompanying text.

¹³⁰ R. FILMER, *PATRIARCHA: OR THE NATURAL POWER OF KINGS* 24 n.10 (London, R. Chiswell et al. eds. 1680). Filmer was echoing King James I's ideas. See JAMES I, *supra* note 77.

¹³¹ Locke's critique appears in his *First Treatise on Civil Government* and is summarized again in Chapter I of the *Second Treatise*. Both treatises were published in 1689. See JOHN LOCKE, *TWO TREATISES ON CIVIL GOVERNMENT* (George Routledge & Sons, Ltd. 1984); see also JAMES TYRRELL, *PATRIARCHA NON MONARCHA: OR, THE PATRIARCH UNMONARCHED* (1681).

¹³² Not for Locke, however, who explicitly rejects the analogy between king and father, and patriarchal political theory in general. See JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT*, in *TWO TREATISES ON CIVIL GOVERNMENT*, *supra* note 131, at 191, 192.

¹³³ The expression is extracted from an Illinois statute of 1867 passed by the state legislature in exercise of its function as *parens patriae*. FREUND, *supra* note 6, at 249 n.260.

becomes clear when state organs have to choose the education to be imparted to children who are under the state's authority in orphanages and reformatories or, indeed, in state-run schools. None of that is problematic—at the level of principles—if the relationship between politics and ethics is conceived in the classical way and the doctrines of public police and *parens patriae* are read in continuity with the central tradition. Thus understood, these doctrines presuppose ethical judgments similar to those that Aristotle—a key representative of that tradition—expected from the legislators of the *polis*, who of necessity must have an eye to virtue and vice.¹³⁴

IV. THE IDEA OF POLICE IN THE UNITED STATES

It has already been pointed out that the writings of Vattel had a massive influence in the incipient United States of America.¹³⁵ Furthermore, Blackstone's ideas, and through him those of Pufendorf and other enlightened European thinkers, had more impact in the United States than in his own country.¹³⁶ Some states even incorporated into their domestic legislation his classification of offenses into five species,¹³⁷ devoting a separate title to crimes against police.¹³⁸ By contrast, there was no differentiated category called "police" in British colonial law, in which the term was simply absent. Nonetheless, there is wide agreement that governments of imperial colonies around the world had plenary powers in order to preserve

¹³⁴ See 3 ARISTOTLE, *supra* note 98, at 1280b4–5 ("All who are anxious to ensure government under good laws make it their business to have an eye to the virtue and vice of the citizens."); see also 7 ARISTOTLE, *supra* note 98, at 1323a14–17 ("If we wish to investigate the best constitution appropriately, we must first decide what is the most desirable life; for if we do not know that, the best constitution is also bound to elude us.").

¹³⁵ See *supra* note 51.

¹³⁶ See 2 THE NEW ENCYCLOPAEDIA BRITANNICA (MICROPAEDIA) 264 (15th ed. 2002) ("The fame of Blackstone in the 19th century was greater in the United States than in Blackstone's native land. After the American Revolution the *Commentaries* was the chief source of the knowledge of English law in the American republic. A book that in the old country was a textbook became in the new an oracle of law."); see also Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 737 (1976) (noting that the *Commentaries* was an instant best seller in the United States).

¹³⁷ See *supra* text accompanying note 78.

¹³⁸ The term "police" appears for the first time as a separate division within a statute in the Revised Statutes of New York in 1829. In 1836 it was also adopted by Massachusetts and later by seven other states. FREUND, *supra* note 6, at § 2, n.2. In a note to an American edition of the *Commentaries*, William G. Hammond affirms that Blackstone's enormous influence upon American law "is nowhere more evident than in the important effects produced even upon the interpretation of federal and state constitutions by the recognition of this [head of offenses against the police] as a distinct power of government, not embraced in the eminent domain, or subject to its limitations." 1 WILLIAM BLACKSTONE, COMMENTARIES 217 (William G. Hammond, ed., 1890).

"peace, order, and good government" in their territories.¹³⁹ This residual sovereignty had similar contents to Blackstone's police taken in the widest possible sense, but in the British Empire it lacked a proper name.

Let us turn now to the incorporation of the idea of police into the rhetoric of American political and constitutional practice. In his 1953 treatise *Politics and the Constitution*,¹⁴⁰ William W. Crosskey undertakes a careful analysis of the use of the term "police" in early American institutional history. Notwithstanding the harsh criticism that the book received,¹⁴¹ its conclusions regarding the meaning and scope of police during the foundation of the United States stand on their own merits, are supported by thorough research, and will therefore be of assistance in the present inquiry, which is not to say that my conclusions are the same as Crosskey's.

Due to the influence of Vattel, Blackstone, and others, the concept of police was part of the discussion that led to the American Constitution of 1787. Crosskey argues that the term "police" (and its—in this context—synonym, "polity"¹⁴²) had three meanings in eighteenth-century North America. First, police and polity had a

¹³⁹ "Peace, order, and good government" and "peace, welfare, and good government" were the two most frequent canonical phrases used in British colonial law to refer to the plenary powers of the colonies. By virtue of a grant of power to make laws for the peace, order, and good government of the colony, a British colonial legislature had (and has) legislative power entirely unrestricted by content and subject-matter (but constrained by territory and by consistency with overriding Imperial statutes). See, e.g., *Regina v. Burah*, (1878) 3 App. Cas. 889 (P.C.) (appeal taken from Bengal H.C.) (holding that, when acting within the limits created by the Imperial Parliament, the India Legislature had plenary powers of legislation); *Winfat Enter. (HK) Co. v. A-G of H.K.*, [1985] A.C. 733 (P.C.) (appeal taken from Hong Kong C.A.) (holding that the Governor of Hong Kong's reclamation of privately held land for public use was not *ultra vires*). A typical example of this kind of law was the regulation by certain colonial legislatures of prostitution in sea ports.

¹⁴⁰ In 1980, the University of Chicago Press republished the original text, without modification, together with a third volume of this book, with the subtitle "The Political Background of the Federal Convention." The third volume was co-authored by William Jeffrey, Jr., who edited the typescript left by Crosskey before his death and added two chapters of his own.

¹⁴¹ One of Crosskey's central theses—based on an erudite revision of the historical sources of the American Constitution—is that the federal government of the United States has stronger powers than has been assumed in conventional wisdom. The author's eagerness to defend a quasi-omnipotent federal government, which leads him to reinterpret several foundational texts, endowed his work with a highly controversial character. Tribe recalls that "Crosskey's efforts provoked savage responses," 1 *TRIBE*, *supra* note 5, at 61, and quotes an ironic statement from Henry Hart's review of *Politics and the Constitution*: "The Don Quixote of Chicago breaks far too many lances in his onslaughts upon the windmills of constitutional history to permit detailed review of each adventure." *Id.* at n.52 (quoting Henry M. Hart, Jr., *Professor Crosskey and Judicial Review*, 67 *HARV. L. REV.* 1456, 1456 (1954) (book review)). For another significant critical review of Crosskey, see Robert G. McCloskey, Book Review, 47 *AM. POL. SCI. REV.* 1152 (1953), which argues that Crosskey's work, while analytically exhaustive, was too extreme to be a valuable contribution to scholarly discourse.

¹⁴² "Police" and "polity" had a partially overlapping range of meanings. See *supra* text accompanying notes 53–56.

meaning that has survived until today: civil government and administration.¹⁴³ This meaning of police and polity "was known, and indeed ancient, in the eighteenth century."¹⁴⁴ Nevertheless, "besides this still surviving sense, 'polity' had then certain other senses that now are obsolete."¹⁴⁵

Crosskey states that "police" and "polity" had a narrow technical meaning that can be traced to the writings of Vattel and Blackstone. Thus understood, these terms "covered only the laws and other governmental arrangements made to 'preserve the public peace, tranquility, and concord,' through maintenance of 'public health, safety, good order, and convenience.'"¹⁴⁶ Police (or polity) was therefore an "'object' of government, [which] contemplated the preservation of domestic tranquility, through maintenance of public morals and public order, and promotion of public convenience, public safety and public health."¹⁴⁷ In this sense police and polity were contrasted with other objects of government such as justice and the regulation of commerce or trade, although as Crosskey points out, "a particular legislative act might sometimes be viewed as a means to some two, or perhaps all three, of the foregoing 'objects'"¹⁴⁸ (that is, police, justice, and commerce).

Police and polity had another technical meaning in the eighteenth century, "which was quite as common as the meaning just noted."¹⁴⁹ In this other meaning, "police" was distinguished from what was known to the eighteenth century as "policy," or as it was sometimes called, "the political interest of the nation":

"Policy," in this usage, was defined as the phase of government that had to do with the "general" affairs of a nation, or the affairs, as it was some-

¹⁴³ According to the *Oxford English Dictionary*, one of the current meanings of the terms "police" and "polity" is "civil organization." 12 OXFORD ENGLISH DICTIONARY, *supra* note 19, at 22, 35.

¹⁴⁴ CROSSKEY, *supra* note 47, at 147.

¹⁴⁵ *Id.* It does not seem so clear, however, that these other senses have become obsolete. In fact, it could be argued that they survive to some extent in the vocabulary of the police power, especially considered in its narrower sense. See *infra* Section VI.

¹⁴⁶ CROSSKEY, *supra* note 47, at 147-48 (quoting Vattel).

¹⁴⁷ *Id.* at 150.

¹⁴⁸ *Id.* Hence Crosskey's conclusion:

There was thus unquestionably a good deal of common ground between 'police' (or 'polity') and 'justice' and 'commerce,' not only with respect to the activities of men that were acted upon by government under these three general heads of governmental action; but as to the governmental actions that might be taken with respect to such activities, as well. This means that, except with respect to their constituent 'objects,' in the sense of 'ends,' 'police' (or 'polity') and 'justice' and 'commerce'—*i.e.* 'the regulation of commerce'—were *not* mutually exclusive categories. They were, instead, intersecting categories, just as most of our legal categories—like crimes, torts, contracts, and property—are intersecting categories today.

Id. at 150-51.

¹⁴⁹ *Id.* at 151.

times said, that affected a nation "in the aggregate." "Police," on the other hand (or, as the phrase very frequently was, "internal police"), was defined as the phase of government that had to do with the affairs and derelictions of individuals. The powers relating to "police" in this sense were sometimes known as "civil" or "municipal" powers, while those relating to "policy" were commonly called "political."¹⁵⁰

Hence, according to Crosskey, "policy" included commerce (both internal and external), war and peace, and diplomacy. These grand divisions made up "the entire *political* interest of a nation,' as distinct from its 'police,' or, as was sometimes said, its 'internal,' 'civil,' or 'domestic police.'"¹⁵¹ The domain of "police," in this second sense, was described as "the restraining of the turbulent passions of mankind, the dispensing of justice, and the supporting of order and regulation in society."¹⁵²

Therefore, Crosskey concludes, the meaning of "police" in this second technical usage was not very different from its meaning in the first: the only difference was that, in the second usage, "the dispensing of justice" was included, whereas, in the first, as we have seen, this was not so.¹⁵³ Thus, the first technical meaning was narrower than the second.

Furthermore, "police" and "polity" had a third technical meaning in eighteenth-century America, especially when coupled with the adjective "internal" as in "internal police" or "internal polity." This meaning, which Crosskey incorrectly fails to accept,¹⁵⁴ can be observed in the discussions which took place during the First Continental Congress of 1774. There, the expression was used several times to contrast the internal police of the colonies with the powers of Great Britain. A first example is found in a plan of union between Great Britain and America submitted by Joseph Galloway to the Congress in September, 1774. The plan suggested:

That a British and American legislature, for regulating the administration of the general affairs of America, be proposed and established in Amer-

¹⁵⁰ *Id.* (citation omitted).

¹⁵¹ *Id.* at 152 (citation omitted).

¹⁵² *Id.* (quoting an anonymous pamphlet published in Philadelphia in 1784 and reprinted in *The New Haven Gazette and Connecticut Magazine* in 1787). Crosskey relies heavily on the pamphlet to develop the argument that I summarize in the text. The anonymous piece is reproduced in an appendix to his book.

¹⁵³ It should be added that by stressing the existence of this second meaning of "police," Crosskey sought to support his wider claim that the United States has the constitutional power to regulate commerce, both internal and external, and that this power is distinct from the police power retained by the states. The analysis of the merits of this claim lies outside the scope of this Article.

¹⁵⁴ See CROSSKEY, *supra* note 47, at 157 (rejecting a meaning of "internal polity" that would include all governance that is territorially internal); *infra* note 157 (discussing further Crosskey's interpretation of "internal polity" in the context of the First Continental Congress).

ica, including all the said colonies; within, and under which government, each colony shall retain its present constitution, and powers of regulating and governing its own *internal police*, in all cases what[so]ever.¹⁵⁵

Although Galloway's plan was ultimately unsuccessful, a month later a majority of delegates eventually agreed to a resolution on the subject of colonial and Parliamentary legislative power. In effect, the Continental Congress laid claim for each of the separate colonies to "a free and exclusive power of legislation . . . in all cases of taxation and *internal polity* . . ."¹⁵⁶ It seems clear, *pace* Crosskey,¹⁵⁷ that "internal polity" here—as in Galloway's plan—had a broad meaning, broader even than Crosskey's second technical meaning. "Internal polity" in these contexts connoted a realm of local or domestic sovereignty that entailed a purported limitation for the British Parliament. The colonies were willing to consent "to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members . . ."¹⁵⁸ The rest, namely taxation and internal polity, was reserved to the colonies.

After the adoption of the Declaration of Independence of the United States of America on July 4, 1776, which contains no explicit reference to internal polity,¹⁵⁹ this concern would reappear in the Articles of Confederation adopted by the Continental Congress in 1777 and ratified by the thirteen new states in 1781. Article II declared: "Each State retains its *sovereignty*, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."¹⁶⁰ Although the term "polity" was not used this

¹⁵⁵ 1 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 49 (Worthington C. Ford ed., 1904) (first emphasis added) [hereinafter JOURNALS].

¹⁵⁶ *Id.* at 68 (emphasis added). Moreover, the first draft of the subcommittee's report on violations of rights, prepared by John Sullivan in October 1774, stated that

[T]he power of making laws for ordering or regulating the internal polity of these Colonies, is . . . exclusively vested in the Provincial Legislature of such Colony; and that all statutes for ordering or regulating the internal polity of the said Colonies . . . are illegal and void.

Id. at 67.

¹⁵⁷ Crosskey rejects what he considers the conventional wisdom, *viz.* that "internal polity" in these contexts meant each colony's exclusive right of governing everything territorially internal to it. Rather, Crosskey's view is that the delegates to the Continental Congress understood the phrase "internal polity" in the two technical meanings already mentioned. See CROSSKEY, *supra* note 47, at 157, 171; *supra* text accompanying notes 146–53. Nevertheless, Crosskey acknowledges that "there are occasional loose uses of 'police' in which the word seems to be practically synonymous with 'government.'" CROSSKEY, *supra* note 47, at 1304.

¹⁵⁸ 1 JOURNALS, *supra* note 155, at 68–69.

¹⁵⁹ 5 *id.* at 510–15.

¹⁶⁰ ARTICLES OF CONFEDERATION art. II (1777) (emphasis added); see also 9 JOURNALS, *supra* note 155, at 907–25 (presenting the Articles as adopted by the Congress); 19 JOURNALS OF THE

time, this "sovereignty" of the states was unquestionably the internal polity that had been alluded to in the First Continental Congress. This is confirmed by the wording of the 1776 draft which preceded the final version of Article II. Article III of that draft, the first antecedent of Article II of the Articles of 1781, read as follows:

Each Colony shall retain and enjoy as much of its present Laws, Rights and Customs, as it may think fit, and reserves to itself the sole and exclusive Regulation and Government of its *internal police*, in all matters that shall not interfere with the Articles of this Confederation.¹⁶¹

Immediately after the Declaration of Independence, the thirteen states that had separated from Great Britain started to lay down their own constitutions. Some of them included a Declaration of Rights, with a specific provision concerning police, which became a canonical phrase. The following was the typical formulation: "That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."¹⁶²

The preamble to the New York Constitution of 1777 refers to "so important a subject as the necessity of erecting and constituting a new form of government and internal police, to the exclusion of all foreign jurisdiction, dominion, and control whatever . . ."¹⁶³ Similarly, the preamble to the South Carolina Constitution of 1776 stated that "some mode should be established by common consent, and for the good of the people, the origin and end of all governments, for regulating the internal polity of this colony."¹⁶⁴ The silence of the other original constitutions¹⁶⁵ may well suggest that the

CONTINENTAL CONGRESS 1774–1789, at 213–24 (Gaillard Hunt ed., 1912) (presenting the Articles as ratified by the states).

¹⁶¹ 5 JOURNALS, *supra* note 155, at 547 (emphasis added). Article III has similar wording in the second printed form of this draft: "Each State reserves to itself the sole and exclusive regulation and government of its internal police, in all matters that shall not interfere with the articles of this Confederation." *Id.* at 675.

¹⁶² MD. CONST. of 1776, Declaration of Rights, art. II; N.C. CONST. of 1776, Declaration of Rights, art. II. Several states adopted this language with slight variations. See, e.g., DEL. CONST. of 1776, Declaration of Rights, art. IV ("That the people of this state have the sole exclusive and inherent right of governing and regulating the internal police of the same."); PA. CONST. of 1776, Declaration of Rights, art. III ("That the people of this State have the sole, exclusive and inherent right of governing and regulating the internal police of the same."); VT. CONST. of 1777, Declaration of Rights, art. IV (using language identical to that in the Pennsylvania Constitution). The Massachusetts Constitution approaches that formulation without the term "police." MASS. CONST. of 1780, Declaration of Rights art. IV ("The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent state; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America, in Congress assembled.").

¹⁶³ N.Y. CONST. of 1777, pmbl.

¹⁶⁴ S.C. CONST. of 1776, pmbl.

¹⁶⁵ See GA. CONST. of 1777; N.H. CONST. of 1776; N.J. CONST. of 1776; VA. CONST. of 1776. Rhode Island, also one of the original thirteen states, did not have a constitution until 1842. See

principle of the reserve of police to the states was so widely accepted that it did not need to be expressed.

Furthermore, some states included constitutional provisions requiring their citizens and governing authorities to recur to "fundamental principles" in order to "preserve the blessings of liberty."¹⁶⁶ The Massachusetts Constitution of 1780 declared that "[a] frequent recurrence to the fundamental principles of the constitution, and a constant adherence to those of piety, justice, moderation, temperance, industry, and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government."¹⁶⁷ These provisions bear a clear connection with standards of public morality typically applied in the context of police.¹⁶⁸

Unsurprisingly, the topic of police was raised in the discussions which led to the Constitution of the United States.¹⁶⁹ In the Federal Convention, proposals were made to include in the new Constitution an "internal police" limitation upon the national power. On Tuesday, July 17, 1787, Roger Sherman of Connecticut proposed a resolution stating that the federal government would not be entitled "to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned."¹⁷⁰ Gouverneur Morris of Pennsylvania opposed Sherman's proposal, arguing that "[t]he internal police, as it would be called & understood by the States ought to be infringed in many

6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3222-35 (Francis Newton Thorpe ed., Gov' Prtg. Office 1909).

¹⁶⁶ *E.g.*, N.H. CONST. of 1784, art. I, § 38; N.C. CONST. of 1776, Declaration of Rights, art. XXI; PA. CONST. of 1776, Declaration of Rights, art. XIV. In North Carolina and New Hampshire, these provisions have survived several constitutional amendments. N.H. CONST. art I, § 38; N.C. CONST. art I, § 35; *see also* FREDERIC J. STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 125 (1908).

¹⁶⁷ MASS. CONST. of 1780, Declaration of Rights, art. XVIII. Similar provisions are to be found in the Virginia Constitution of 1776, Bill of Rights, section 15, and in the New Hampshire Constitution of 1783, article I, section 38. The Massachusetts provision cited goes on to say:

The people ought, consequently, to have a particular attention to all those principles, in the choice of their officers and representatives: and they have a right to require of their lawgivers and magistrates an exact and constant observance of them, in the formation and execution of the laws necessary for the good administration of the commonwealth.

MASS. CONST. of 1780, Declaration of Rights, art. XVIII. This provision remains in force.

¹⁶⁸ *See* NOVAK, *supra* note 90, at 151-52 (discussing the close relationship between law and morality in colonial America).

¹⁶⁹ *See* Thomas, *supra* note 8, at 505 ("The drafters of the U.S. Constitution seem to have had a police power concept firmly in mind during the creation and ratification of that document . . .").

¹⁷⁰ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966) (1911).

cases, as in the case of paper money & other tricks by which Citizens of other States may be affected."¹⁷¹ Morris's view prevailed and the resolution was voted down. A proposal substantially identical to Sherman's was advanced later by the Committee of Detail but it, too, was rejected.¹⁷² On September 15, 1787, Sherman repeated his attempt to obtain an "internal police" limitation, but this time he faced Madison's opposition and failed again.¹⁷³

The decision of the Federal Convention drafters not to include a reference to the internal police of the states in the Constitution is somewhat surprising considering that it would have been in line both with the position defended by the colonies a few years before in the Continental Congress,¹⁷⁴ and with the corresponding provisions of some state constitutions.¹⁷⁵ This omission, however, ought not to be misconstrued.¹⁷⁶ The silence of the Federal Constitution should be understood in the context of preceding practice, which clearly confirmed that internal police remained with the states. Madison put it clearly in *The Federalist*, without using the term "police," but tellingly alluding to the "residuary sovereignty of the states."¹⁷⁷ The jurisdiction of the federal government, he wrote, "extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."¹⁷⁸ Similarly, Hamilton wrote:

An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States.¹⁷⁹

¹⁷¹ NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 303 (Adrienne Koch ed., Ohio Univ. Press 1966).

¹⁷² According to this proposal, made on August 22, 1787, Congress would have been given power to provide for the "general interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be competent." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 170, at 367.

¹⁷³ NOTES OF DEBATES IN THE FEDERAL CONVENTION, *supra* note 171, at 649–50. The wording of this proposal was similar to that of the previous ones.

¹⁷⁴ See 5 JOURNALS, *supra* note 155, at 547 (illustrating the importance of the police power in drafting the Articles of Confederation).

¹⁷⁵ See *supra* text accompanying notes 162–64 (summarizing the role of the police power in early state constitutions).

¹⁷⁶ Cf. CROSSKEY, *supra* note 47, at 153, 1304 (observing the flexible meaning of the word "police" in this context).

¹⁷⁷ THE FEDERALIST NO. 39, at 186 (James Madison) (Terence Ball ed., 2003).

¹⁷⁸ *Id.*

¹⁷⁹ THE FEDERALIST NO. 32 (Alexander Hamilton), *supra* note 177, at 145–46.

The principle stated in these passages of *The Federalist* follows from the enumeration of powers granted to Congress by Article I, Section 8 of the Constitution. As Chief Justice Marshall would assert in the famous case of *Gibbons v. Ogden*, "The enumeration presupposes something not enumerated" ¹⁸⁰

In modern times, the Supreme Court reaffirmed this idea, relying on Article I, Section 8 to hold that "[t]he Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation."¹⁸¹ At any rate it is obvious that, as Scheiber puts it, the historical significance of the concept of police "derives from usage and application, not from the language of the Constitution itself. Nowhere in the Constitution does the term appear."¹⁸² It was for one of the Constitution's 1789 Amendments, however, to explicitly introduce the idea of "police" (if not the actual word) into the Constitution. The Tenth Amendment reads as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people. ¹⁸³

Although there are conflicting interpretations of this Amendment,¹⁸⁴ it has been plausibly argued that, without prejudice to the argument from Article I, Section 8, the Amendment functions as a principal constitutional basis of state police power¹⁸⁵ and that "[t]he police power is one of the powers reserved to the States by the Tenth Amendment."¹⁸⁶ Thus the Tenth Amendment effectively captures the idea of the "residuary sovereignty of the States,"¹⁸⁷ albeit without using

¹⁸⁰ 22 U.S. (9 Wheat.) 1, 195 (1824).

¹⁸¹ *United States v. Lopez*, 514 U.S. 549, 566 (1995) (holding that Congress does not have authority to regulate firearms in school zones).

¹⁸² Scheiber, *supra* note 10, at 1744. Pomeroy explains the constitutional silence on police by stating that it was not necessary to mention it because police measures are simply part of the general system by which each state endeavors to protect the good morals, lives, health, persons and property of its inhabitants. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 226 (4th ed. 1879); see also Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 476-78 (2004) (noting that the term "police" was used throughout the constitutional debates in reference to the powers not granted to the federal government).

¹⁸³ U.S. CONST. amend. X.

¹⁸⁴ See, e.g., EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 442-48 (14th ed. 1978) (recounting some of the conflicting interpretations of the Tenth Amendment over the years).

¹⁸⁵ NOVAK, *supra* note 90, at 13.

¹⁸⁶ LAWRENCE B. EVANS, LEADING CASES ON AMERICAN CONSTITUTIONAL LAW 1226 (2d ed. 1925).

¹⁸⁷ See *supra* text accompanying notes 157-58. It should be noted that the sovereignty we are talking about is limited by the powers—some of them exclusive, some concurrent—delegated to the general government. As one of the delegates put it in the Federal Convention of 1787, "[t]he States were not 'Sovereigns' in the sense contended for by some. They did not possess

the term "police." At any rate, it became clear that police—or the police power, as it was later called¹⁸⁸—was treated as vested in the states, insofar as they were considered governments of general jurisdiction. The federal government, on the other hand, was conceived of as a government of delegated and enumerated powers, and therefore it was not constitutionally authorized to exercise police powers.¹⁸⁹

This state of affairs changed, however, with the transformation of business that followed the First World War; "[e]nterprises that had once been local or . . . regional in nature had become national in scope."¹⁹⁰ This entailed, among other things, a clear increase in federal regulations, most enacted under the Commerce Clause of the Constitution,¹⁹¹ which gives Congress the power, *inter alia*, to regulate commerce among the states. Although the delegated powers doctrine and the concomitant reservation of the police power to the states remained (and remain) true in theory, for many practical purposes "the government of the United States functions as a government of *general* jurisdiction."¹⁹²

Nevertheless, a landmark 1995 decision of the Supreme Court sought to put a limit to the ever-expanding reading of the Commerce Clause and reaffirm the basic principles of federalism. In *United States v. Lopez*,¹⁹³ the Court struck down the federal Gun-Free School Zones Act and thus invalidated, for the first time in nearly sixty years, a

the peculiar features of sovereignty, they could not make war, nor peace, nor alliances nor treaties." NOTES OF DEBATES, *supra* note 171, at 152; *see also id.* at 217 (describing remarks by several delegates to the effect that the states had never been completely sovereign and independent).

¹⁸⁸ *See infra* Section V.

¹⁸⁹ *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819) ("Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted."); *see also* George, *supra* note 121, at 21 ("In the United States, the governments of the states are, in form, at least, governments of general jurisdiction. They exercise police powers legally subject only to state or federal constitutional limitations on the scope of their authority. . . . In this respect, the governments of the states differ markedly—again, in form, at least—from the government of the United States. The latter government is not a government of general jurisdiction . . ."); G. H. Reynolds & D. B. Kopel, *The Evolving Police Power: Some Observations for a New Century*, 27 HASTINGS CONST. L.Q. 511, 533 (2000) ("[S]tate governments have a police power, and the federal government does not").

¹⁹⁰ *United States v. Lopez*, 514 U.S. 549, 556 (1995).

¹⁹¹ U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .").

¹⁹² George, *supra* note 121, at 22–23. George actually says that the United States now functions as a government of general jurisdiction for "all *practical* purposes." *Id.* at 22. But this is something of an overstatement, especially in light of the Supreme Court's decision in *Lopez*, discussed in the main text. Writing in 1925, Evans had already asserted that, although there is no federal police power, "in the exertion of the authority with which it is vested, the Federal Government may adopt measures which have the quality of police measures . . ." EVANS, *supra* note 186, at 1226.

¹⁹³ 514 U.S. 549 (1995).

congressional reliance on its commerce power. Chief Justice Rehnquist wrote for the Court:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."¹⁹⁴

The Court concluded its reasoning by making explicit reference to the police power:

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general *police power* of the sort retained by the States To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.¹⁹⁵

Moreover, the Court recently decided two cases that illustrate the extent to which questions surrounding the police power are still important today. In *Gonzales v. Raich*,¹⁹⁶ a majority of the Court held that the Federal Controlled Substances Act, which prevents ill people from possessing, obtaining, or manufacturing marijuana for their personal medical use, does not infringe the reserved powers of California. The decision was based on an expansive reading of the Commerce Clause. The dissenters considered this interpretation of the Clause incompatible with the police power of the states. According to Justice O'Connor, who wrote the main dissenting opinion,

¹⁹⁴ *Id.* at 552 (citing THE FEDERALIST NO. 45 (James Madison)). Although the four dissenting Justices would have upheld the Gun-Free School Zones Act on Commerce Clause grounds, they were not willing "to hold that the Commerce Clause permits the Federal Government to regulate any activity that it found was related to the economic productivity of individual citizens, to regulate marriage, divorce, and child custody, or to regulate any and all aspects of education." *Id.* at 624 (Breyer, J., dissenting) (internal quotation marks omitted). Justice Thomas rightly pointed out that in this important respect there was agreement with the majority's view. *Id.* at 585 (Thomas, J., concurring) (arguing that the Constitution does not allow the federal government to regulate "marriage, littering, or cruelty to animals"); see *id.* at 564 (Rehnquist, C.J.) (rejecting the United States's argument that the Commerce Clause grants plenary power to regulate absolutely any activity related to "national productivity"); *id.* at 577 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."). On the relatively minor impact of *Lopez* in preventing the federalization of crime, see John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 674 (1999).

¹⁹⁵ *Lopez*, 514 U.S. at 567–68 (emphasis added) (internal citations omitted); see also *United States v. Morrison*, 529 U.S. 598, 618–19 (2000) (citing the enumerated powers of the Constitution as proof of no federal police power).

¹⁹⁶ 545 U.S. 1 (2005).

"[t]he States' core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens,"¹⁹⁷ and California's Compassionate Use Act, which authorizes limited marijuana use for medicinal purposes, is well within those powers. In a separate dissent, Justice Thomas argued that the majority's decision "threatens to remove the remaining vestiges of States' traditional police powers."¹⁹⁸

Finally, in the 2006 case *Gonzales v. Oregon*,¹⁹⁹ the Court recalled that "the structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."²⁰⁰

V. A QUESTION OF NAMES: FROM "POLICE" TO "THE POLICE POWER"

The idea of police received different names in the United States. James Kent, one of the first constitutional scholars and a professor at Columbia University, described the "power of regulation" of the states in his *Commentaries on American Law* in terms that bring to mind the analyses of Pufendorf, Vattel, and Blackstone:²⁰¹

But though the property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community.²⁰²

It seems clear that this "power of regulation" embraces much of the European idea of police.²⁰³ In fact, as Corwin comments, in due

¹⁹⁷ *Id.* at 42 (O'Connor, J., dissenting).

¹⁹⁸ *Id.* at 66 (Thomas, J., dissenting).

¹⁹⁹ 126 S. Ct. 904 (2006).

²⁰⁰ *Id.* at 923 (internal citations omitted).

²⁰¹ As a matter of fact, Kent expressly cites Pufendorf and Vattel when dealing with the power of regulation. 2 KENT, *supra* note 68, at *340 n.(b).

²⁰² *Id.* at *340.

²⁰³ Although Kent does not use the word "police" when he explains the power of regulation, he uses it elsewhere. See, e.g., 1 *id.* at *43 ("The consular convention between France and this country, in 1778, allowed consuls to exercise *police* over all vessels of their respective nations") (emphasis added).

course Kent's "power of regulation" became the "police power" of American constitutional doctrine.²⁰⁴ It was for the most part the Supreme Court that brought about this transformation.

The term "police power" did not come into general legal use until the 1880s,²⁰⁵ nearly a half century after it was first introduced by Chief Justice John Marshall in the 1827 decision, *Brown v. Maryland*.²⁰⁶ He had already raised the idea in earlier cases, and for this reason it has been said to have come to him by degrees.²⁰⁷ For example, in *Dartmouth College v. Woodward*, the Chief Justice wrote that "the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government . . ."²⁰⁸ We find here the word "internal," a key notion in Blackstone's understanding of police.²⁰⁹

In *Gibbons v. Ogden*, which also preceded *Brown v. Maryland*, the word "police" comes to the surface for the first time in American Supreme Court case law. In another opinion by Chief Justice Marshall, the Court stated with reference to inspection laws that:

They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State . . . are component parts of this mass.

²⁰⁴ EDWARD S. CORWIN, *LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JURIDICAL CONCEPT* 88 (1948); see also Hastings, *supra* note 6, at 365–66 (discussing the evolution of the concept and pinpointing *Brown v. Maryland* as the origin of the term). In the famous *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1873), Justice Miller wrote for the Supreme Court that Kent's power of regulation was indeed the police power and quoted the text from Kent above transcribed.

²⁰⁵ The term "police power" is not defined in Bouvier's *Law Dictionary* until the 1883 edition, and the 1898 edition of this standard dictionary says that the law on this subject is all of recent growth. Moreover, "[i]t was not until 1879 that [the phrase] began to appear among the subdivisions of constitutional law in the annual supplements of [the *United States Digest*.]" Hastings, *supra* note 6, at 359–60.

²⁰⁶ 25 U.S. (12 Wheat.) 419 (1827). In his lucid essay, "The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State," W. G. Hastings states that a "somewhat careful search for the phrase fails to find it in legal or political writings of this country prior to that time [when *Brown v. Maryland* was decided]." Hastings, *supra* note 6, at 360. Nevertheless, as Crosskey says, "[t]he phrase 'police power' is so natural a phrase, in view of the notions of the time, that it is difficult to believe that it was never used before Marshall used it in this particular case . . ." CROSSKEY, *supra* note 47, at 1305. Hastings himself seems to be of the same view: "It was entirely natural that it should appear in a decision of our Federal Supreme Court and from Chief Justice Marshall." Hastings, *supra* note 6, at 360.

²⁰⁷ Hastings, *supra* note 6, at 363.

²⁰⁸ 17 U.S. (4 Wheat.) 518, 629 (1819).

²⁰⁹ Blackstone used the expression "domestic," rather than "internal." 4 BLACKSTONE, *supra* note 64, at *162. The term "internal" was present in the constitutional history of the states and of the United States. See *supra* notes 156–83 and accompanying text.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation.²¹⁰

A few pages later, the Chief Justice connects this residuary legislative power of the states with police when he speaks of “[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens”²¹¹ Further, he adds, “in exercising the power of regulating their own purely *internal* affairs, whether of trading or *police*, the States may . . . enact laws”²¹² As Hastings says, he “has not quite reached the term [police power], but the conception is almost, if not quite, complete.”²¹³

In the *Brown* case three years later, Chief Justice Marshall finally speaks explicitly of the “police power,” distinguishing it from certain taxation powers concerning imports and exports that the Constitution grants Congress:

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition [i.e., the Imports and Exports Clause of the American Constitution] ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health

. . . .

[But t]he power to direct the removal of gunpowder is a branch of the *police power*, which unquestionably remains, and ought to remain, with the States.²¹⁴

Thus, from *police* there emerged naturally, as it were, the *police power*. In effect, the “combined phrase,” as the latter has been called,²¹⁵ is nothing but a different name for the old idea of police.²¹⁶

²¹⁰ 22 U.S. (9 Wheat.) 1, 203 (1824).

²¹¹ *Id.* at 208; see also *id.* at 204 (“If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its *system of police*.”) (emphasis added).

²¹² *Id.* at 209–10 (emphasis added). In the same paragraph, the Supreme Court makes reference once more to “a power to regulate [the States’] domestic trade and police.”

²¹³ Hastings, *supra* note 6, at 364.

²¹⁴ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442–43 (1827) (emphasis added). Citing this case, Freund explains that “[t]he federal Supreme Court first employed the term [police power] to indicate the otherwise undefined mass of governmental powers reserved to the states.” Ernst Freund, *Police Power*, in *CYCLOPEDIA OF AMERICAN GOVERNMENT* 706 (Andrew McLaughlin et al. eds., 1914). The dissent in *Brown v. Maryland* alludes to “the internal police of the States,” referring to the same thing. 25 U.S. (12 Wheat.) at 454 (Thompson, J., dissenting).

²¹⁵ Hastings, *supra* note 6, at 366.

This is confirmed by judicial decisions that talk alternatively of police and police power to refer to the same thing. One example, among others,²¹⁷ is Justice Field's celebrated opinion for the Court in *Barbier v. Connolly*.²¹⁸ He first says that a local ordinance prohibiting the washing and ironing of clothes in public laundries and wash houses within certain limits of a city and at certain hours is "purely a *police regulation* within the competency of any municipality possessed of the ordinary powers belonging to such bodies."²¹⁹ Later on, he chooses to address the question using the name "police power:"

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory, and expensive, yet, if no discrimination against anyone be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. . . . In the case before us the provisions requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but as we have said, this is a matter for the determination of the municipality in the execution of its *police powers*, and not a violation of any substantial right of the individual.²²⁰

²¹⁶ Walter W. Cook saw this clearly in a short but significant article published in 1907:

Is there any connection between the two phrases? I believe that there is, and that a study of the subsequent history will show that the one was substituted for the other, and that the more modern phrase, "the police power," is to-day used by our courts in much the same sense that the earlier phrase ["internal police"] was used in the convention by the framers of the constitution.

Cook, *supra* note 11, at 326.

²¹⁷ See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887) (mentioning the various assignments for the police). Justice Harlan, writing for the Court, speaks of "police powers of the State," *id.* at 661, and further alludes to "police regulations," *id.* at 662. In both cases, he is pointing at enactments prohibiting the manufacture and sale of intoxicating liquors. See *infra* text accompanying notes 236-40. A similar example is to be found in *Patterson v. Kentucky*:

By the settled doctrines of this court the *police power* extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for *police* purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government. The Kentucky statute under examination manifestly belongs to that class of legislation. It is, in the best sense, a mere *police regulation*, deemed essential to the protection of the lives and property of citizens.

97 U.S. 501, 504 (1878) (emphasis added).

²¹⁸ 113 U.S. 27 (1885).

²¹⁹ *Id.* at 30 (emphasis added).

²²⁰ *Id.* at 32 (emphasis added). Another example of a judicial decision that illustrates the natural emergence of the police power from the idea of police is the following oft-quoted dictum of Chief Justice Redfield in the Supreme Court of Vermont:

We think the power of the legislature to control existing railways in this respect, may be found in the general control over the *police* of the country, which resides in the law-making power in all free states This *police power* of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.

Thorpe v. Rutland, 27 Vt. 140, 149 (1855) (emphasis added).

William J. Novak sums up the point when he asserts that the "substantive roots of state regulatory power [police power, are found] in early modern notions of police" ²²¹ In fact, the concept of police power as received in the *Brown* case and its progeny is a broad one, which comprises at the same time the idea of residuary sovereignty, ²²² the second of the technical meanings of police in the eighteenth century, ²²³ and Kent's power of regulation. ²²⁴

Finally, it should be pointed out that, by and large, the expression "police power" has replaced the term "police" in the vocabulary of American constitutional law. The different editions of a typical American encyclopedia bear witness to this evolution. The 1832 edition of the *Encyclopaedia Americana* asserted that police, "in the common acceptation of the word, in the U. States and England, is applied to the municipal rules, institutions and officers provided for maintaining order, cleanliness, &c." ²²⁵ In twentieth-century editions, this definition gives way to the present, common meaning of police, the branch of the criminal justice system that has the specific responsibility of maintaining law and order and combating crime within the society. ²²⁶ Something similar to what appeared before in the entry for "police" comes now in the entry for "police power," ²²⁷ an entry absent from the 1832 edition.

VI. THE POLICE POWER, BROAD AND NARROW

In the early cases that I have reviewed, the phrase "police power" was used as a synonym for the *Federalist Papers*' "residuary sovereignty of the states," ²²⁸ "namely, that general authority not surrendered to the General Government, and reserved severally by each State to regulate in the manner that each should see fit all the matters of local concern." ²²⁹ In other words, "police power" was equivalent to the

²²¹ NOVAK, *supra* note 90, at 13.

²²² See *supra* text accompanying notes 160, 178.

²²³ See *supra* text accompanying notes 149–52.

²²⁴ See *supra* text accompanying note 202.

²²⁵ ENCYCLOPAEDIA AMERICANA, *supra* note 95, at 214.

²²⁶ 22 THE ENCYCLOPEDIA AMERICANA INT'L EDITION 299–301 (Americana Corp. 1980) (1829) (describing the history and current practices of police around the world).

²²⁷ *Id.* at 301.

²²⁸ THE FEDERALIST NO. 39, *supra* note 178; see *supra* text accompanying note 178 (discussing this concept further).

²²⁹ 3 WESTEL WOODBURY WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1766 (2d ed. 1929). Similarly, Cook defines the police power as "the unclassified, residuary power of government vested by the constitution of the United States in the respective States." Cook, *supra* note 11, at 329. Likewise, Barros notes that "the police power, as a concept of American constitutional law, is synonymous with the entirety of the sovereign power of the states that remained after the constitutional grant of limited powers to the federal government." Barros, *supra* note 68, at 472.

"internal polity" to which the First Continental Congress had laid claim for the colonies²³⁰ and to the "internal police" that came up in the discussions which led to the establishment of the Federal Constitution.²³¹ Hence, "the term was not used to designate a special branch or sphere of the States' legislative authority; rather, it was employed to mark off the sphere of State authority from that of the General Government."²³² It was, it has been argued, a catchword, "a brief formula for the expression of the federalist idea of the state's functions in the federal system."²³³ Although the police power was not conceived of by the Supreme Court "as including familiar forms of the exercise of . . . [the state's] sovereignty, to which definite names had already attached, such as 'eminent domain,' 'taxation,' and 'administration of justice,' etc. . . . [in practice it was] recognized [by the Court] to embrace them, or rather as not to be separable from them."²³⁴

This *broad* meaning of the police power was articulated most clearly by Chief Justice Taney in his opinion in the *License Cases*:

[W]hat are the police powers of a state? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates²³⁵

²³⁰ See *supra* note 156 and accompanying text.

²³¹ See *supra* text accompanying note 170.

²³² 3 WILLOUGHBY, *supra* note 229.

²³³ Hastings, *supra* note 6, at 372.

²³⁴ *Id.* at 405. But see Cook, *supra* note 11, at 329 ("In other words, we have taken the residuary powers of government possessed by the States in our system—the 'residuary sovereignty' of *The Federalist*—have classified and given specific names to certain parts, e.g., power of taxation, of eminent domain, etc., and then, perhaps for want of a better term, have called what is left 'the police power.'").

²³⁵ *License Cases*, 46 U.S. (5 How.) 504, 583 (1847). Earlier formulations of the broad concept, in terms of "internal police," include Justice Barbour's oft-quoted dictum in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 103 (1837), that "[a]ll those powers which relate to merely municipal legislation, or which may more properly be called internal police, are not surrendered or restrained; and, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive." Also in *Miln*, Justice Thompson posed the following rhetorical question: "Can anything fall more directly within the *police power and internal regulation* of a state, than that which concerns the care and management of paupers or convicts, . . . ?" *Id.* at 148 (Thompson, J., concurring) (emphasis added); see also *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 552 (1837) ("We cannot deal thus with the rights reserved to the states; and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.").

Crosskey has argued that Chief Justice Taney's opinion in this case implied a departure from inherited wisdom and that his explanation of the police power differs substantially from that of his predecessor Chief Justice Marshall, and from the eighteenth-century understanding of police.²³⁶ Nevertheless, as I have already suggested, there is a clear line of continuity between the *License Cases* and the idea of the residuary sovereignty of the states present in the Continental Congress,²³⁷ in the *Federalist Papers*,²³⁸ and in Chief Justice Marshall's key opinions.²³⁹

Alongside this broad concept of police power a narrow one started to emerge. By the end of the nineteenth century, the states were trying to justify the enforcement of local regulations affecting interstate commerce, the control of which was in principle reserved to the federal government, by arguing that the regulations in question were reasonably required for the protection of certain public goods, *viz.* public health, public safety, and public morals. The promotion of these goods was essential to the police power of the states, it was claimed. Thus, as Willoughby rightly puts it:

[T]he phrase police power, by degrees, came, in practice, to refer not to the general residuary powers of the States but to their right to provide and enforce reasonable regulations in behalf of the morals, safety and convenience of their inhabitants, even when interstate commerce or some other subject of Federal control was incidentally or indirectly, though often substantially, affected.²⁴⁰

Under this *narrow* meaning, the police power designated a particular branch of state legislative authority, namely the one aimed at promoting public health, public safety, and public morality. A paradigmatic example of this conception of the police power can be observed in *Mugler v. Kansas*.²⁴¹ Decided in 1887, this is a case in

²³⁶ Crosskey argues that Chief Justice Taney manufactured a new theory of the police power of the states in his *License Cases* opinion—a theory which, according to Crosskey, was at the same time of vast importance in the development of the “states’ rights” doctrine and without foundation in accepted usage. CROSSKEY, *supra* note 47, at 154–55.

²³⁷ See *supra* text accompanying notes 157–58.

²³⁸ See *supra* text accompanying note 178.

²³⁹ See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 443 (1827) (“[T]he police power . . . unquestionably remains, and ought to remain, with the States.”). For a later pre-*License Cases* decision in the same vein, see *Miln*, 36 U.S. (11 Pet.) at 139, where the Court determined that all issues relating to municipal legislation are necessarily under state power. Hastings is of a view similar to that adopted in the text: “He [Chief Justice Taney] was, as he firmly believed, carrying out not only the intentions of the framers of the constitution [. . .] but Marshall’s judicial opinion as well.” Hastings, *supra* note 6, at 387.

²⁴⁰ 3 WILLOUGHBY, *supra* note 229, at 1766–67.

²⁴¹ 123 U.S. 623, 661 (1887) (“It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.”). Another case conceiving of the police power as the authority to protect public morals, public health, and

which a Kansas statute prohibiting the manufacture and sale of intoxicating liquors had been challenged under the Fourteenth Amendment of the Constitution.²⁴² The Supreme Court acknowledged the jurisdiction of the state legislature with respect to the promotion of public morals, health, and safety, and grounded that jurisdiction in the police power:

[B]y whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as *the police powers of the State*, and to determine, primarily, what measures are appropriate or needful *for the protection of the public morals, the public health, or the public safety*.²⁴³

Nonetheless, the Court in this case made it clear that the mere allegation by a state that the police power thus understood was at stake would not suffice. There must exist a substantial relation between the chosen means and the ends, goods, or values purportedly promoted; that is to say public morals, health, or safety. Hence:

It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.²⁴⁴

public safety was *Butchers' Union Slaughter-House & Live-Stock & Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, in which the Court stated, "[w]hile we are not prepared to say that the legislature can make valid contracts on no subject embraced *in the largest definition of the police power*, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of those powers to the prejudice of the general welfare. These are the *public health and public morals*." 111 U.S. 746, 750-51 (1884) (some emphasis added); see also *New Orleans Gas Light Co. v. La. Light Co.*, 115 U.S. 650, 672 (1885) (acknowledging that states still maintain the right to regulate contracts with respect to public health, morals, and safety).

²⁴² The Fourteenth Amendment had been ratified in 1868, scarcely twenty years before *Mugler* was decided. Its relevant part reads as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

²⁴³ *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887) (emphasis added).

²⁴⁴ *Id.* at 661.

In other words, the Court announced that in the absence of a substantial relationship between means and ends, the Due Process Clause of the Fourteenth Amendment would be compromised and the legislative enactment would be unconstitutional. In *Mugler*, however, the Court found that the prohibition in question was a reasonable restriction of rights in order to protect the morals, health, and safety of the public.²⁴⁵

Mugler v. Kansas, together with other post-Fourteenth Amendment cases such as *Barbier v. Connolly*, stands for the proposition that the Fourteenth Amendment does not take "from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted."²⁴⁶ This is just a confirmation that the old doctrine of internal police remained in place after the Civil War: "[T]he police power which had remained with the States in the formation of the original Constitution of the United States . . . had not been taken away by the amendments adopted since."²⁴⁷

It can also be reasonably argued that *Mugler* became the starting-point of a new understanding of the police power,²⁴⁸ an understanding which is different from but not incompatible with the previous one. Even as the old broad idea of the residuary sovereignty of the states remained, the new narrow concept which restricted the scope of the police power to the promotion of public morals, health, and safety gained currency in *Mugler* and other late-nineteenth-century cases.²⁴⁹ As Nowak and Rotunda put it:

²⁴⁵ See *id.* at 662 ("[W]e cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks . . .").

²⁴⁶ *Id.* at 663; see also *id.* at 664 ("It cannot be supposed that the States intended, by adopting that Amendment [i.e., the Fourteenth], to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community."); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) ("[N]either the [Fourteenth] amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.").

²⁴⁷ *Butchers' Union Slaughter-House & Live-Stock & Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 747 (1884); see also *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 667 (1878) ("[The police power] belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now.").

²⁴⁸ See CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1686 (9th ed. 2004) [hereinafter CONG. RESEARCH SERV.] (identifying *Mugler* as the starting point for the conception of the police power as solely controlling the public safety, health, and morality).

²⁴⁹ *E.g.*, *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888) (upholding a Pennsylvania statute prohibiting the manufacture of oleomargarine, reasoning that "[i]t is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with that [the

The *Mugler* decision gave notice that the Court would begin evaluating the relationship of a law to its purported purposes. A statute had to have a substantial relation to the protection of the public health, morals, or safety before the Court would sustain the measure as a valid exercise of the state's police power.²⁵⁰

This was the consequence of reading some substantial content into the Due Process Clause of the Fourteenth Amendment. The Supreme Court recognized *Mugler's* relevance in its famous abortion decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, stating that "for at least 105 years, since *Mugler v. Kansas*, . . . the Clause has been understood to contain a substantive component . . . one 'barring certain government actions regardless of the fairness of the procedures used to implement them.'"²⁵¹

The substantive due process philosophy reached its peak, of course, with *Lochner v. New York*,²⁵² decided in 1905. *Lochner* called for a closer scrutiny of the means-ends relationship than the one required by *Mugler*,²⁵³ and also for judicial assessment of legislative ends themselves. During the so-called *Lochner* era,²⁵⁴ the Supreme Court forcefully used the Due Process Clause to outlaw regulations aimed at social and economic control, such as minimum wage²⁵⁵ and maximum hour laws.²⁵⁶ In doing so, the Court adopted a narrow

Fourteenth] Amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States").

²⁵⁰ NOWAK & ROTUNDA, *supra* note 5, at 407.

²⁵¹ 505 U.S. 833, 846 (1992) (citations omitted).

²⁵² 198 U.S. 45 (1905) (striking down a New York labor law establishing maximum working hours in bakeries).

²⁵³ Tribe explains that during the *Lochner* era, "the Court interpreted its requirement of a substantial means-ends relationship so as to invalidate statutes which interfered with private economic transactions unless traditional (even if evolving) common law concepts demonstrated a proper fit between the legislation and its asserted objectives." 1 TRIBE, *supra* note 5, at 1346. He further claims that "*Lochner* itself provides the best example of such strict and skeptical means-ends analysis." *Id.*

²⁵⁴ The *Lochner* era started with *Lochner* in 1905 but had been foreshadowed in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), in which a Louisiana statute that prohibited any person from issuing insurance on property in the state with companies that had not been admitted to do business in the state was invalidated. The Court, in an opinion by Justice Peckham, the same Justice who a few years later wrote the majority opinion in *Lochner*, held that the statute exceeded the state's police power and violated the Due Process Clause of the Fourteenth Amendment because it infringed the liberty to contract for insurance.

²⁵⁵ *Adkins v. Children's Hosp.*, 261 U.S. 525, 560-61 (1923) (deciding that regulation on minimum wages for women and children were beyond the limitations of the police power).

²⁵⁶ *Lochner*, 198 U.S. 45 (1905). Other famous *Lochner*-era cases include *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915), both invalidating legislation forbidding employers to require employees to agree not to join a union. In the latter case the Court underlined the narrower meaning of the police power, reasoning that "[t]he police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it,

definition of the police power.²⁵⁷ The Court first asserted that a certain right, typically the liberty of contract, was protected under the Due Process Clause. It then stated that an invasion of that liberty could only be justified by a proper exercise of the police power. Finally, the Court concluded that the state's police power existed *only* for certain limited objectives, namely, the promotion of public health, safety, and morals, and that economic purposes were outside its proper, rather narrow scope.²⁵⁸ This was the official *Lochner*-era doctrine, notwithstanding the declarations to the contrary that may be found in *Lochner* itself²⁵⁹ and in other *Lochner*-era cases in which a broader meaning of the police power was employed.²⁶⁰ For example, in *Western Turf Ass'n v. Greenberg*, decided in 1907, the Court stated that:

Decisions of this Court, familiar to all, and which need not be cited, recognize the possession, by each State, of powers never surrendered to the General Government; which powers the State, except as restrained by its own constitution or the Constitution of the United States, may exert not only for the public health, the public morals and the public safety, but for the general or common good, for the well-being, comfort and good order of the people.²⁶¹

without in effect nullifying the constitutional guaranty [of the Due Process Clause of the Fourteenth Amendment]." *Id.* at 18 (emphasis added).

²⁵⁷ Barros takes a similar view:

[T]he doctrine [of economic substantive due process] represented a significant attempt to limit the scope of the police power, and the nature of the police power plays an important role in the Supreme Court cases that represent both the apex and the demise of economic substantive due process—*Lochner* and *Nebbia v. New York*.

Barros, *supra* note 68, at 488 (footnote omitted). Barros goes on to explain that in *Lochner*, Justice Peckham "fram[ed] the scope of the police power in a narrow fashion." *Id.* at 489.

²⁵⁸ As Stone et al. put it:

If the Court believed the regulation was truly designed to protect the health, safety, or morals of the general public, it was apt to uphold the law. But if the Court perceived the law to be an effort to readjust the market in favor of one party to the contract, it was more likely to hold the regulation invalid.

STONE ET AL., *supra* note 5, at 757.

²⁵⁹ *Lochner*, 198 U.S. at 53 ("[The police power] relate[s] to the safety, health, morals, and general welfare of the public. . . ." (emphasis added)).

²⁶⁰ Although nearly two hundred economic regulations were struck down during the *Lochner* era, many others survived constitutional challenge. See GUNTHER & SULLIVAN, *supra* note 5, at 466; STONE ET AL., *supra* note 5, at 756.

²⁶¹ 204 U.S. 359, 363 (1907). Other cases of this period considered "general welfare" or "general prosperity" as legitimate police power ends. See *Sligh v. Kirkwood*, 237 U.S. 52, 59 (1915) ("[The police power] embraces regulations designed to promote public convenience or the general prosperity or welfare . . ."); *Coppage v. Kansas*, 236 U.S. 1, 18 (1915) ("[I]t has been held permissible for the States to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare . . ."); *Eubank v. Richmond*, 226 U.S. 137, 142 (1912) (stating that the use of the police power is valid to "promote the public convenience or the general prosperity"); *Chic., Burlington & Quincy Ry. v. Drainage Comm'rs*, 200 U.S. 561, 592 (1906) (holding that a railway company can be charged for the expenses needed to rebuild its bridge and culvert in compliance with statute); *Cal. Reduction Co. v. Sanitary Reduction Works*,

In 1919 the Court explicitly affirmed the coexistence of the broad and the narrow meanings of the police power:

[T]he words "police power" [are] susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people.²⁶²

At any rate, it is clear that after the demise of the *Lochner* era in the mid-1930's, the police power (in its narrow, substantive sense) grew to encompass more than just the promotion of public morals, health, and safety. In 1934, the Supreme Court approved Minnesota's mortgage emergency regulations²⁶³ and upheld New York's milk price control regulations.²⁶⁴ Both statutes were deemed to be valid exercises of the police power of the states. As Tribe says, those decisions were the beginning of the judicial abdication of responsibility for review of the substance of government economic choices—and the collapse of *Lochner*.²⁶⁵

The *Lochner* era came to an end when, in 1937, for reasons that will not be explored in this Article,²⁶⁶ the Court reversed itself and upheld minimum wage legislation in *West Coast Hotel v. Parrish*.²⁶⁷ From this point onwards, the Court rejected the *Lochner*-ian reading of the Due Process Clause and began to regularly uphold regulations in the economic field. In the words of Nowak and Rotunda, "[t]he *Parrish* opinion marked the beginning of the end for judicial scrutiny of economic legislation under the concept of substantive due process."²⁶⁸ Several cases decided during the *Lochner* years were overruled in the 1940's. As the Court put it in *Lincoln Federal Union v. Northwestern Iron*, the "*Allgeyer-Lochner-Adair-Coppage* constitutional doctrine"²⁶⁹ had been abandoned:

This Court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. In doing so it has consciously returned

199 U.S. 306, 318 (1905) (holding an ordinance which granted the exclusive privilege to handle waste and garbage to one plant to be valid). It has been argued that in the *Lochner*-era cases in which the police power was said to extend to health, safety, morals, and welfare, "welfare" was understood by the Court as physical, rather than economic or social. 9 BRITANNICA (MICROPAEDIA), *supra* note 136, at 559.

²⁶² Dakota Cent. Tel. Co. v. South Dakota *ex rel.* Payne, 250 U.S. 163, 185–86 (1919).

²⁶³ Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

²⁶⁴ *Nebbia v. New York*, 291 U.S. 502 (1934).

²⁶⁵ 1 TRIBE, *supra* note 5, at 1361.

²⁶⁶ For analysis of the *Lochner*-era's demise, see, for example, STONE ET AL., *supra* note 5, at 761, and the OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 924 (Kermit L. Hall et al. eds., 1992).

²⁶⁷ 300 U.S. 379 (1937).

²⁶⁸ NOWAK & ROTUNDA, *supra* note 5, at 418.

²⁶⁹ 335 U.S. 525, 535 (1949).

closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.²⁷⁰

This entailed an expansion of the police power. Now it was clear that general welfare, including economic and social interests, was within its permissible scope. In the words of a 1952 decision, "the police power is not confined to a narrow category; it extends . . . to all the great public needs."²⁷¹ As was authoritatively stated in a publication prepared by the United States Congress, "[s]tates have an inherent 'police power' to promote public safety, health, morals, public convenience, and general prosperity . . ."²⁷² Furthermore, "[t]his power is not confined to the suppression of what is offensive, disorderly, or unsanitary."²⁷³

Thus, from the initially broad definition of police power as state sovereignty, the courts moved to a narrow notion that restricted its scope to the promotion of public health, safety, and morals. This was followed by a return to a broad conception, although somewhat different from the old one, by which the police power encompasses all that is for the public welfare. The three definitions remain in American constitutional law, but when the courts today use the narrower definitions and make reference to the acknowledged ends of the police power ("public health, safety, morals, welfare") they do so not, as in the *Lochner* era, to limit the scope of the state's authority, but rather to provide non-exhaustive examples of the goods that the police power may promote.²⁷⁴

CONCLUSION

My purpose in this Article has been to trace the historical origins and development of the term "police power" in American constitutional law, and the inquiry has followed a chronological order. In summarizing the historical development, it is instructive to proceed in reverse order, starting with the term's contemporary use and working back from there.

²⁷⁰ *Id.* at 536.

²⁷¹ *Day-Brite v. Missouri*, 342 U.S. 421, 424 (1952) (upholding a conviction under a Missouri statute forbidding employers from docking the wages of employees who have absented themselves in order to vote).

²⁷² CONG. RESEARCH SERV., *supra* note 248, at 1681.

²⁷³ *Id.* at 1681 n.48.

²⁷⁴ See, e.g., *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (plurality opinion) (listing the traditional exercises of police power).

Nowadays, insofar as the expression is used in American constitutional law, the phrase "police power" normally refers to the authority of the states for the promotion of public health, public safety, public morals, and public welfare. But this has not always been the case. With the rise of the *Lochner* era at the beginning of the twentieth century, the police power was narrowly construed to encompass only the promotion of public health, safety, and morals²⁷⁵; economic regulation was in principle taken not to be within the police power during this period. After the demise of *Lochner* in 1937,²⁷⁶ economic interests were recognised to be clearly within the legitimate scope of the police power, under the label of either public welfare or public prosperity, and this remains the case today.

Alongside this substantive definition of the police power there remains a broader one of older pedigree. The phrase was coined by Chief Justice Marshall in *Brown v. Maryland*²⁷⁷ to convey the idea of the residuary sovereignty of the states: the great mass of powers not delegated by the states to the federal government and thus retained by them; a residuum which is obtained "after taking away from the general powers of government, first, such powers as the convention of 1787 found it necessary to bestow upon the general government, and, second, such other powers ordinarily regarded as sovereign as had already acquired distinct recognition,"²⁷⁸ particularly (so far as concerns the states) eminent domain, taxation, and administration of justice.²⁷⁹ This idea was reiterated in subsequent decisions and was most clearly articulated in Chief Justice Taney's opinion for the Court in the *License Cases*.²⁸⁰ As recently as 1995, the majority of the Court has deployed this idea of the police power in *United States v. Lopez*,²⁸¹ which clearly suggests the debate surrounding the police power is of far more than merely historic or academic interest.

The broad conception of the police power has roots in the earlier notion of police which appeared in decisions preceding *Brown v. Maryland*.²⁸² More importantly, "internal police," or "internal polity," was a principal category of early American constitutional and pre-constitutional discourse. As has been obvious all along, the term had

²⁷⁵ This narrowing of the police power had been announced in earlier decisions such as *Mugler v. Kansas*, 123 U.S. 623 (1887). See *supra* notes 241–45.

²⁷⁶ See *supra* notes 267–71.

²⁷⁷ 25 U.S. (12 Wheat.) 419 (1827).

²⁷⁸ NOVAK, *supra* note 90, at 405.

²⁷⁹ See *supra* text accompanying note 234. This idea was foreshadowed by the conceptualization of police. See *supra* text accompanying note 96.

²⁸⁰ 46 U.S. (5 How.) 504 (1847); see *supra* text accompanying note 235.

²⁸¹ 514 U.S. 549 (1995); see *supra* notes 193–95.

²⁸² 25 U.S. (12 Wheat.) 419; see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 19 (1824) (contrasting laws of police with laws of commerce); *supra* text accompanying notes 210–12.

a meaning far removed from our present understanding of the police as the forces dedicated to upholding public order and suppressing crime. It was the name for the whole range of legislative power not delegated to the federal government and thus retained by the states. Moreover, before the Constitution was sanctioned, the First Continental Congress had laid claim for each of the separate colonies to "an exclusive power of legislation . . . in all cases of taxation and internal polity."²⁸³ In effect, in that congress of 1774, the expression was used several times to contrast the internal police of the colonies from the powers of Great Britain.²⁸⁴

The Americans imported this concept of police from European political theory and practice. The writings of Blackstone and Vattel on police were especially influential in the incipient United States. In his *Commentaries*, Blackstone designated a particular category of crimes as "offenses against the public police." These included vagrancy, luxury, gambling, and common nuisance, among others. Instances of common nuisance included disorderly inns and ale houses, lotteries, and offensive trades and manufactures. Blackstone's notion of offenses against the public police foreshadowed American constitutional law's narrow, substantive conception of the police power. The *Commentaries* also dealt with police—using it here as a synonym of *oeconomics*—in the context of the prerogative of the king. Here, police was related to the regulation of commerce and the establishment of weights and measures. This economic meaning of police is also present in Vattel, who affirmed the authority of the sovereign to make 'regulations of police' in order to limit the use of private property. By and large, Vattel tied his definition of police—or polity, as the French term "*police*" was sometimes translated—to regulations prescribing "whatever will best contribute to the public safety, utility and convenience."²⁸⁵

The eighteenth-century notion of police is difficult to understand as it encompasses a wide variety of things and is an end of government embracing several objects that do not fit well under the other ends of government, namely justice, international relations, taxation, and eminent domain. It operates as a residuary and miscellaneous legal category. Perhaps its main characteristic is that when police is at stake, the impact on the public domain is such that it cannot be adequately captured by the language of individual rights.²⁸⁶

²⁸³ JOURNALS, *supra* note 155, at 68 (emphasis added).

²⁸⁴ See *supra* text accompanying notes 155–58.

²⁸⁵ 1 VATTEL, *supra* note 52, bk. I, ch. XIII, § 174, at 76–77.

²⁸⁶ See *supra* text accompanying note 97.

Both Blackstone and Vattel advanced their thoughts on police in the context of the formative analogy between king (and kingdom) and father (and family). It is precisely because the king is like a *paterfamilias* that he ought to take care of police, the well-ordered pursuit of the common good of the kingdom. Blackstone's and Vattel's mild patriarchalism had antecedents in Sir Robert Filmer's *Patriarcha*, the first strong version of moral patriarchal theory.²⁸⁷

The eighteenth century also witnessed the development of the idea of police in Scotland, where it appeared as a heading of miscellaneous regulations and, like in Blackstone's *Commentaries*, as a class of crimes, namely "offenses against the police."²⁸⁸

This Article has shown the dependence of a key notion of American constitutional law—the police power—on an important eighteenth-century idea: police. The term "police" began as an obscure element of the incipient constitutional arrangements of several jurisdictions, including Scotland, England, and the United States. It eventually served as the basis for the articulation of the concept of police power, a concept that for many years was a cornerstone of American constitutional law and that still remains part of that law, despite clear indications that it is at the heart of various tensions, outlined in the Introduction. Determining the future developments of the police power is a task for another occasion. But it is my hope that by delving into the historical background of the police power, this Article will have thrown some light on this often misunderstood legal concept.

²⁸⁷ See *supra* Section III.

²⁸⁸ See *supra* text accompanying notes 25–36.